In the Privy Council.

No. 21 of 1896.

ON APPEAL

FROM HER MAJESTY'S COURT OF QUEEN'S BENCH IN EQUITY FOR MANITOBA.

BETWEEN

Francis Douglas Grey and Sir John Robert Heron Maxwell,

APPELLANTS,

AND

The Manitoba and North-Western Railway Company of Canada,

RESPONDENTS.

Proceedings and Judgment.

NORTON, ROSE, NORTON & CO.,
57½, Old Broad Street, E.C.,
Solicitors for the Appellants.

BOMPAS, BISCHOFF, DODGSON, COX & BOMPAS,
4, Great Winchester Street, E.C.

A. P. BLUNDELL, TAYLOR & CO., Printers, &c., 173, Upper Thames Street, E.C.

In The Privy Council.

Grey v. Manitoba.

This argument lasted about eleven hours.

The following table, showing the number of interventions, by the different members of the Court, affords striking proofs of the active and unceasing interest taken by their Lordships in the arguments of appeals.

Number of interventions by Court.	For Appellants Mr.Blake (Opening)	Mr.Ewart (Following)	For Respondents Mr.Robinson (Answering)	Mr Swinfen Eady (Following)	For Appellants Mr.Blake (In Reply)	Totals.
Lord Watson	144	15	48	9	19	235
Lord Hobhouse	130	20	52	14	9	225
Lord Macnaghten	13	5	27	3	12	60
Lord Morris	52	11	18	6	5	92
Lord Shand	100	23	48	9	13	193
Lord Davy	184	30	54	11	22	301
Totals	623	104	247	52	80	Grand Total 1106

In the Privy Council.

GREY

v.

THE MANITOBA & NORTH WESTERN RAILWAY COMPANY OF CANADA.

COUNCIL CHAMBER, WHITEHALL,

10*th February*, 1897.

PRESENT—

The Right Honourable Lord WATSON,
The Right Honourable Lord HOBHOUSE,
The Right Honourable Lord MACNAGHTEN,
The Right Honourable Lord MORRIS,
The Right Honourable Lord SHAND,
The Right Honourable Lord DAVEY.

(Transcript of the Shorthand Notes of Messrs. Marten, Meredith and Henderson, 13, New Inn, Strand, London, W.C.)

The Honourable EDWARD BLAKE, Q.C., M.P., Sir EDWARD CLARKE, Q.C., M.P., Mr. J. S. EWART, Q.C., and Mr. A. E. BALFOUR, instructed by Messrs. Norton, Rose, Norton and Co., appeared for the Appellants.

Mr. C. ROBINSON, Q.C., Mr. SWINFEN EADY, Q.C. and Mr. F. H. PHIPPEN, instructed by Messrs. Bombas, Bischoff, Dodgson, Coxe and Bombas, appeared for the Respondents.

[FIRST DAY.]

Mr. BLAKE: I appear, my Lord, with my friends, Sir Edward Clarke, Mr. Ewart and Mr. Balfour, for the Appellants, who are Trustees under a deed of mortgage, securing bonds issued under the authority of Acts of Parliament, by the Manitoba and North Western Railway Company, who are the Respondents to the appeal. Bonds to the amount of £540,000 sterling were issued on what is called the first division of the railway of the Respondent Company, being 180 miles, extending from Portage la Prairie in the Province of Manitoba, to a place called Langenberg in the North West Territories, 9½ miles beyond the limits of the Province of Manitoba. The Appellants filed a Bill in Manitoba praying for a sale under the direction of the Court and for a declaration as to the character and nature of a charge for working expenses which was

created by the security. There are, as it seems to me, three principal questions which are susceptible each of subdivision into two more or less important categories. The first one is, firstly, whether under the law and the instruments this first division of which I have spoken is saleable by the Appellants, or at the instance of the Appellants by a Court—I do not say at this moment by what Court but by any Court—and secondly, whether the 170½ miles of the railway, part of the first division, that part of it which is within the Province of Manitoba, is so saleable.

Lord HOBHOUSE: That is the second part of the first question.

Mr. BLAKE: That is the second part of the first question. The first part is the question of the saleability of the first division.

Lord HOBHOUSE: Whether it is susceptible of sale or not.

Mr. BLAKE: Whether it is susceptible of sale or not, under the law and the instruments; and if not whether that portion of it which is within the boundary of Manitoba is so saleable. The second question, also divisible perhaps into two heads, although by a less clearly marked line, is, firstly, whether the revenues of the first division are, as against the Appellants, before sale, charged with the working expenses of the whole line constructed or to be constructed, or only with those of and incidental to that first division; and, secondly, whether, after sale, and in the hands of the purchaser, they are chargeable with the whole or only with the part. That I regard as the second question sub-divided.

Lord WATSON: That only affects the interest to be sold.

Mr. BLAKE: That only affects the interest to be sold. It affects the character of what is to be sold. In fact, you could not make a sale while that question was undetermined, except as a matter of absolute speculation.

Lord MORRIS: That question becomes unnecessary if the first question is decided against you.

Mr. BLAKE: Certainly. If we cannot sell at all, it is of no consequence to consider on what terms we could sell.

Lord HOBHOUSE: You have got a receiver. Is not it a question whether what he receives is chargeable with the whole of the expenses?

Mr. BLAKE: Yes, my Lord, that is the first branch of the second question which may arise, but not the second branch, which only arises on sale. The third question is whether the Manitoba Court, in which this bill is filed, has jurisdiction to order a sale, assuming the first question is answered in the affirmative, notwithstanding that 9½ miles of the subject matter is beyond the boundary of the province. That question also is divisible into two. The second branch is whether it might order a

sale of the 170½ miles which are within the territorial limits of the Province of Manitoba.

Now, as too frequently happens with reference to railway enterprises in the country from which this Appeal comes, there are a very great many Acts of Parliament affecting the transaction, and I have to state, as briefly as I possibly can, a portion of the prior history of the railway down to the point at which I shall have to enter into greater detail. I shall mention to your Lordships when we reach the point at which the Statutes are made under which the instrument in question is executed. I will just trouble your Lordships with a very brief preliminary sketch, so that your Lordships may be brought up to that point of the prior history. There is an appendix, I presume, before your Lordships, called, I believe, "Extracts from Statutes," and I will refer your Lordships upon each occasion to it. It is the Respondents' paper. I shall have to supplement it at some time, but I will refer your Lordships to its pages with reference to the various documents to which I am about to call your Lordships' attention.

Now, the Company was incorporated originally as a Provincial Railway Company of the Province of Manitoba by the Legislature of Manitoba in the year 1880. The Act is to be found at page 3 of the Appendix to which I have just directed attention, and the original limits were from a place called Poplar Point, on the one side, to the boundary of the province on the other.

LORD SHAND: Is that shown on the map which we have?

Mr. BLAKE: Well, I do not think Poplar Point is of any consequence. Your Lordships see the boundary of the Province of Manitoba, although I do not think this boundary was the old boundary, because the boundary of Manitoba was extended afterwards, but it is utterly immaterial.

LORD SHAND: The line began where:

Mr. BLAKE. At Poplar Point, extending to the western boundary of Manitoba, as it then was. Then I refer to one point which is, that by this original Act authority was given to construct the different sections of the railway in such order, &c. That may have more or less bearing upon the elucidation of subsequent Acts, but that is the only point, I think, material in that Act. Then, in 1881, the Manitoba Legislature authorised the extension of the limits of this Provincial Railway, and it commences at Portage la Prairie, which is further to the eastward than the old limit, and it extends to the new boundary of the Province of Manitoba, the boundaries of that province having been about that time enlarged. That is at page 5 of the book. The Company built 35 miles of their road, and in 1882 they petitioned the Canadian Parliament to be authorised to extend the railway into the North West Territories. The recital of that petition in the Act to which I am just about to refer, your Lordships will find at page 20. As far as I can judge the intermediate references are not material.

LORD DAVEY: Then it was originally a Manitoba Company incorporated for the purpose of making a railway exclusively within the Province of Manitoba?

Mr. BLAKE: That is so, and, being so, they petitioned in 1882 the Canadian Parliament, as appears from page 20, to be authorised to extend the railway into the North West Territories. At page 21 your Lordships will find the Act of Canada of 1882, whereby the railway is declared to be for the general advantage of Canada, which, as your Lordships are aware, is one of the methods whereby jurisdiction is conveyed to itself by the Canadian Parliament under the British North America Act, although I apprehend it was an unnecessary recital in this case, because what the Canadian Parliament was about to do was to extend the railway outside the limits of the Province of Manitoba, and that also gave it jurisdiction. There were two methods of giving jurisdiction, and they took both. They declared it to be for the general advantage of Canada, and they extended it to Prince Albert in the North West Territories, making the line 430 miles instead of 170½, which it would have been, to the boundary of the Province.

LORD HOBHOUSE: It became an interprovincial road so to speak?

Mr. BLAKE: It became an interprovincial or at any rate an extra road, and it was got within the exclusive jurisdiction of the Parliament of Canada.

LORD HOBHOUSE: What were the figures?

Mr. BLAKE: 170½ miles is all that is within Manitoba; 430 miles is the gross—not built your Lordships will understand, but authorised. Then page 21, the same page which I have given, contains clause 10, which gives certain powers of bonding and mortgaging, to which I need not further direct the attention of the court, in my view of the case, because it is not the relevant clause. But, still, it is as well that I should state that that is the first power of bonding and mortgaging that the Canadian Parliament gives. Then under the Act of 1883, which is to be found at pages 24 and 25 of the appendix, by the fifth clause, the powers of bonding and mortgaging were amended and re-enacted. I will refer to that Act very briefly just now. I shall have to refer to it more at length, when I have given your Lordships the exact condition of things and the extent to which its construction becomes material. The fifth clause of that Act is the relevant clause. It authorises the directors by resolution, &c. "to issue bonds under the Company's seal, and the bonds hereby authorised to be "issued shall, without registration or formal conveyance, constitute a first mortgage and "privilege upon the said undertaking and upon the said railway constructed, and to be "thereafter constructed, and upon the property of the Company acquired, or which may "be thereafter acquired—excepting therefrom, municipal bonuses—and upon its tolls "and revenues derived from operating the said railway, after deduction from such tolls "and revenues of working expenses, and upon the franchises of the Company, save and "except as is hereinafter provided for; and each holder of the said bonds shall be deemed "to be a mortgagee upon the said securities *pro ratâ* with the other bondholders, and "shall have priority as such: Provided, that the amount of bonds so issued, sold, or "pledged, shall not exceed twenty thousand dollars per mile, to be issued in proportion to "the length of railway constructed, or under contract to be constructed: but notwithstand "ing anything in this Act contained, the Company may secure the bonds to be issued by "them by mortgage deed, creating such mortgages, liens and incumbrances upon the whole

"or any part of such property, assets and revenues of the Company present or future, or "both as shall be described in the said deed, but such revenue shall be pledged in the "first instance to the payment of the working expenses of the railway; and by the said "deed the Company may grant to the holders of such bonds, or to the trustee or trustees "named in such deed, all and every the powers and remedies granted in this Act in "respect of the said bonds and all other powers and remedies not inconsistent with this "Act, or may restrict the bondholders in the exercise of any power, privilege, or remedy "granted by this Act, as the case may be; and all such powers, rights and remedies as "shall be so contained in such mortgage deed, shall be valid, binding and available to the "bondholders in manner and form as therein provided." Then in December, 1883, a first mortgage, not that now in question, securing bonds to the amount of £4,100 a mile, which was the equivalent of the 20,000 dollar limit, over the whole line, to be issued as constructed or under confract, was executed with a power of sale.

LORD HOBHOUSE: In December, 1883.

Mr. BLAKE: In December, 1883. That is for the whole line.

LORD SHAND: What do you say the amount was?

Mr BLAKE: £4,100 a mile, the presumed equivalent of 20,000 dollars, which was the utmost limit of the borrowing power. Then in order of time, the next incident to which I have to attract attention is that on the 19th April, 1884, there was passed another amendatory Act to be found at page 25 of this Appendix, but I refer to page 26, the ninth Clause, which provides that "It shall not be necessary, in "order to preserve the priority, lien, charge, mortgage or privilege, purporting to "appertain to or to be created by any bond issued or mortgage deed executed under the "provisions of the Act cited in the first section of this Act, that such bond or deed "should be enregistered in any manner, or in any place whatever: but every such "mortgage deed shall be deposited in the office of the Secretary of State of Canada—of "which deposit notice shall be given in the *Canada Gazette* a copy of any such mortgage "deed, certified to be a true copy by the Secretary of State or his deputy, shall be "received as *prima facie* evidence," so that the local laws which, as your Lordships are "aware, prescribe in all the provinces a very stringent system of registration, in order to preserve priority were abrogated so far as this mortgage was concerned, and in substance there was substituted a deposit with the Secretary of State of the mortgage deed with the notice in the *Canada Gazette* of its being so deposited. Then in 1884, the financial scheme developed by the mortgage of 1883, to which I have referred, of £4,100 a mile—all the bonds ranking *pari passu*—was found unsatisfactory, and it was changed to a provision for the issue of first mortgage bonds for £3,000 a mile, under the deed of 1883—a limitory provision by the Company itself, limiting the first mortgage bonds, which might have been issued up to £4,100 a mile, to £3,000 a mile, and a provision was made for an issue under a second mortgage of £1,100 a mile, so that the £4,100 a mile, which had been all on first mortgage, was attempted to be cut into two, making a first mortgage of £3,000 a mile, and a second mortgage of £1,100 a mile. Those documents were deposited with the Secretary of State. In 1885 another Act was passed, which your Lordships will find at page 27.

LORD SHAND : Did you give the page for this scheme?

Mr. BLAKE : No, my Lord, because that is not in the appendix, but it is referred to in the Act I am just now dealing with, because they thought it important or necessary to get legislative confirmation. In 1885, in the Act which is to be found at page 27 of the Appendix, your Lordships find a recital of the authority to issue bonds to the amount of 20,000 dollars, and a recital of the issue of bonds to the amount of 14,600 dollars per mile, such bonds being the first mortgage bonds, and that "it has been found that the said sum is not sufficient to enable the Company to construct their road, and they have found it necessary to issue second mortgage bonds to the amount of 5,400 dollars per mile, for the purpose of raising money for the prosecution of the construction of the said railway ; and whereas doubts have arisen as to the legality of such second mortgage bonds, and the said Company have by their petition prayed that such bonds should be legalised, and it is expedient that the prayer of the said petition be granted, therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, declares and enacts as follows :—The bonds of the said Manitoba and North Western Railway Company of Canada, mentioned in the preamble of this Act, and issued to the amount of 14,600 dollars per mile, under the authority of a deed of the Company dated on the 1st day of December, 1883, and modified by a deed of the Company dated on the 15th day of May, 1884, are the first mortgage bonds." And the second mortgage bonds mentioned in the preamble, bonds for 5,400 dollars, are legalised and confirmed.

LORD DAVEY . Then there is a proviso that the total amount of bonds shall not increase beyond 20,000 dollars.

Mr. BLAKE : I think that was to make quite sure that the original limitation should not be extended. Nothing turns on it. There was no attempt to extend it.

LORD DAVEY : What was the difficulty about the second mortgage ?

Mr. BLAKE : I think it must have been that the authority given by the Act was an authority to issue to no greater extent than 20,000 dollars, which should all rank, pari passu, and then they withdrew that, and there was a question whether they had authority to put some first and some second.

LORD DAVEY : To make them first and second.

Mr. BLAKE : I think that must have been it.

LORD DAVEY : I think so.

Mr. BLAKE : Then this brings me down to the point of time of the execution of the mortgage which is before your Lordships. All this is preliminary. In 1886 the Company found these arrangements unsatisfactory. The arrangements for a mortgage for £3,000 a mile over the whole line constructed or to be constructed, and running, pari passu, and for a second mortgage of £1,100 a mile on the same conditions were found unsatisfactory ; and they decided, first of all, to substitute for the

second mortgage bonds preference shares, and secondly to substitute for the first mortgage bonds bonds on the first division from Portage La Prairie to Langenberg, which was 180 miles in all. Your Lordships understand that although there was an authority to issue bonds to the extent of £3,000 a mile over the whole railway, yet the power to issue came into operation only as the sections were constructed, or at any rate under contract. And there was little constructed, and nothing under contract at the moment, or something very small, and they then determined to create a division or section of the easternmost part of their railway, from Portage La Prairie to Langenberg, and to substitute for first mortgage bonds, which had been issued on authority to issue, pari passu, on the whole line.

LORD DAVEY: Could they do that under Section 5 of the Act of 1885?

Mr. BLAKE: They thought so; and that also has been confirmed. I will show your Lordship that that is the view which has been taken.

LORD HOBHOUSE: By subsequent legislation?

Mr. BLAKE: Yes; by subsequent legislation. If there be any doubt about it, it is confirmed. They thought they had the power to do it, because the Act of 1883 provided as to the "whole or any part." That was the reason I specially directed your Lordship's attention to the phrase, "the whole or any part of the property of the Company," when I was reading the Act of 1883.

LORD DAVEY: I do not see those words "the whole or any part."

Mr. BLAKE: They are in the Act of 1883, Section 5, where you find a provision as to the bonds.

LORD DAVEY: "The said bonds hereby authorised to be issued shall, without registration or formal conveyance, constitute a first mortgage or privilege upon the said undertaking."

Mr. BLAKE: It is not in the bond part. It is in the mortgage part.

LORD SHAND: All this was legalised I understand you say?

Mr. BLAKE: That is what we contend, but I should like Lord Davey to see that. It is on page 25, half-way down the Clause—"By mortgage deed creating such mortgages, liens and incumbrances upon the whole or any part of such property, assets and revenues of the Company." That was the presumed authority, and, as we contend, the sufficient authority, upon which they decided to issue bonds upon a part.

LORD DAVEY: Yes; I see it now.

Mr. BLAKE: Then on the 16th April, 1886, having decided on that scheme of finance, they actually executed the mortgage deed and deposited it with the Secretary

of State. That mortgage deed I shall have to trouble your Lordships with, I am afraid.

LORD MORRIS: Is that the deed upon which the suit is instituted?

Mr. BLAKE: Yes, I shall have have to trouble your Lordships at length with it afterwards. It is on page 65 of the Record. I shall not ask your Lordships to look at it just at this moment. That is the mortgage deed. Then, as I say, the date of that is the 16th April, 1886.

LORD HOBHOUSE: That is the mortgage of the first division?

Mr. BLAKE: That is the mortgage of the first division upon which we sue. Then by an Act of June, 1886, it recites, after reciting the date of the execution and deposit of the mortgage to be found on pages 28 and 29 of the Appendix, that at the first meeting held in March, 1886, "the Shareholders authorised the Board of Directors to make application to Parliament for authority for the cancellation of the second mortgage bonds issued by the Company and for power to issue in lieu thereof preferred stock with a dividend payable thereon at a rate not exceeding five per cent., non-cumulative, out of the income after the interest on the first mortgage bonds is paid, and whereas none of the said second bonds are outstanding; and whereas the said Directors have by their petition prayed for the passing of an Act for that purpose and for certain amendments to Section 5" (that is the bonding and mortgaging clause) "and it is expedient to grant the prayer of the said petition." I do not think I need trouble your Lordships to read the first section because that is the section authorising on certain conditions the substitution of Preference Stock for the Second Mortgage Bonds, with which we really have nothing to do; but the fourth section, to be found on page 29, is material:—"And whereas the Company has, in pursuance of its powers in that behalf, heretofore made and issued certain First Mortgage Bonds secured by a mortgage bearing date the first day of December, One thousand eight hundred and eighty-three, on the whole of its line of railway, which mortgage was duly deposited in the office of the Secretary of State, so soon as all such bonds so issued have been surrendered and cancelled" (which was the financial scheme, because it was not intended that the two sets should be outstanding), "the bonds secured by a mortgage on the first division of the railway, being 180 miles thereof, commencing at Portage la Prairie, which mortgage bearing date the sixteenth day of April, One thousand eight hundred and eighty-six, has been duly executed, and is deposited in the office of the Secretary of State, shall be hereby ratified and confirmed, and such bonds to the amount of three thousand pounds sterling per mile of railway, shall thereupon be the first lien and charge on such first division of the railway comprising 180 miles as aforesaid as provided by the said mortgage deed." Thus they recite the execution of the deed, and they identify it by reciting its deposit with the Secretary of State, and upon condition—a condition which is acknowledged to have been performed—of the cancellation of the First Mortgage Bonds executed under the deed of 1883, they provide that it is ratified and confirmed, and that these bonds are the first lien and charge on the first division comprising the 180 miles as provided by the deed. That is not the only ratification, although I submit it to be an ample one.

Lord DAVEY : Is the validity of that deed in question ?

Mr. BLAKE : In some sort in question. I do not think it is contested that this Act has not an operation, but I believe that it is contested that it has the full operation which we contend for. It will be difficult to explain that until I bring your Lordships to the precise points in controversy between us.

Then, before going back to the mortgages and these prior statutes for the purpose of catching their effect, I just wish to refer to page 32 which is a general Act of 1893. After amending, amending and amending, patching, patching and patching, till nobody knew where they were, they passed a Consolidating and Amending Act and thus got the whole of the legislation with reference to the Company together.

Lord DAVEY : It is not a Dominion Act ?

Mr. BLAKE : Yes, my Lord, since the period of the first Act that was mentioned and which I cited, they are all Dominion Acts.

Lord HOBHOUSE : I suppose the Manitoba Legislation's jurisdiction ceased when the Declaration had been made by the Dominion Legislature that the railway was for the general advantage of Canada.

Mr. BLAKE : That is so. The Manitoba Legislature might probably grant to the Corporation, but they could not affect its existence at all in any way. They might grant benefits to it but they could not modify its conditions in any way. Then I refer particularly at this stage, though I shall have to refer to another part of the Act for other purposes——

LORD HOBHOUSE : Then this is the governing Act now—the Act of Parliament of 1893.

Mr. BLAKE : I suppose it is the governing Act. though it is absolutely necessary to deal with the other Acts in determining the issues. I am citing it now for the purpose of showing ratification. The 17th and 18th sections and the schedule are those which affect us. At the end of page 35 are to be found the 17th and 18th sections. "The bonds, debentures, or other securities, debenture stock and preference stock, which have been issued by the Company before the passing of this Act and are set out in Schedule 2 to this Act, which schedule is hereby for the avoidance of doubts declared to be part of this Act, are hereinafter respectively called 'scheduled bonds,' 'scheduled debenture stock' and 'scheduled preference stock' or collectively 'scheduled securities.' The 'scheduled securities' shall remain until cancellation or redemption thereof, or until payment or discharge in full of the principal and interest thereby secured, the first preferential claims and charges upon the respective portions of the Company's undertaking or property affected or charged as security for such payment in each case and according to the tenor and effect of any bye-law or of any deed of mortgage, conveyance or assurance in each case ; and nothing in this Act shall impair any power, right or remedy, privilege, or priority now existing in reference to

such scheduled securities." Then, when you come to Schedule 26, to be found on page 39 in the latter part of the page, your Lordship will find "Bonds, Debenture Stock and Preference Stock now existing and charged upon the railway, all prior issues having been cancelled and surrendered. Bonds to the amount of £540,000 sterling, being the first lien and charge upon the first division of the Company's railway being 180 miles thereof, commencing at Portage la Prairie, which bonds are secured by a mortgage on such first division dated the 16th day of April, 1886." Perhaps I may relieve your Lordships from recurring in the course of my argument to this Act, by just attracting your Lordships' attention to one other clause of it which may be of importance for another subject to be found on page 33, being the fourth section which provides, not for the first time, but as this is a consolidating act, former provisions were necessarily inserted, that. "The head office of the Company shall be at the town of Portage la Prairie, and may be changed to such other place in Canada as is fixed by bye-law passed at any Annual General Meeting or at any Special Meeting of Shareholders duly called for that purpose; and the Company may from time to time by bye-law appoint and fix other places within or beyond the limits of Canada, at which the business of the Company may be transacted, and at which the Directors or Shareholders may meet when called as determined by the bye-laws. General Meetings of the Company, whether annual or special, may be held at the City of Winnipeg or elsewhere as may be appointed by bye-law." The old domicile of the Company of course had been in the Province of Manitoba, and that domicile was continued so far as necessary by this legislation.

LORD DAVEY: Although it is empowered to construct an inter-provincial railway, it still remains a Manitoba Corporation? However, it does not matter.

Mr. BLAKE: I think it contains traces of its Manitoba origin, because the power given by the Dominion was a power to extend this railway; but it is not a Manitoba Corporation in the sense of being under the control of the Legislature of Manitoba any more. It is a Manitoba Corporation which has been taken, so to speak, into the legislative possession of the Parliament of Canada.

LORD HOBHOUSE: What is the effect of the Federation Act? One of the exclusive jurisdictions given to it is with regard to Dominion railways as to which a certain declaration has been made.

Mr. BLAKE: It is by a sort of exception, my Lord. The enumeration of Section 91, Sub-section 29, confers upon the exclusive power as to Dominion "Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces, and any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act, assigned exclusively to the Legislatures of the Provinces." And amongst those expressly excepted in Section 92, are those found in this enumeration—"Local works and undertakings other than such as are of the following classes: Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the Province with any other

or others of the Provinces, or extending beyond the limits of the Province," (which this did) "such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada." So that it is cut out from the local and gets into the other.

LORD HOBHOUSE: Yes.

Mr. BLAKE: Now on this state of facts, I proceed to deal very briefly with the first question, which I suggested to your Lordships as to be argued before you, namely:—whether under the law and the instruments the first division is saleable by the Appellants themselves or at their instance by a Court, apart from the question of the jurisdiction of any particular Court. I say very briefly, because according to my understanding of both the judgments in the Courts below, the judgment of Mr. Justice Killam, who delivered the original decision and the judgments of Chief Justice Taylor, and Mr. Justice Bain, (Mr. Justice Dubuc only concurred) who delivered the judgments in the Court of Appeal or re-hearing—both those judgments I understand confirm the proposition that this first division of 180 miles is a saleable division under the law and the instruments, apart from the difficulties as to jurisdiction, created by its being partly situated in one Province and partly in the territory; and my friends who raise the question here are in the position of raising it against those judgments.

LORD HOBHOUSE: You mean they thought it saleable in its nature, if only there was a tribunal which had power to order the sale.

Mr. BLAKE: Yes.

LORD SHAND: When you say saleable, you mean liable to be sold?

Mr. BLAKE: Yes.

Lord SHAND: That the creditor had the right to sell?

Mr. BLAKE: That the trustee of the mortgagees had the right of selling, and had the right to have a sale executed or enforced with the assistance of a competent Court. Whether there is such a Court is the question I am going to take last.

Now, I will just state very briefly what is my understanding of this first question. The mortgage itself, without for present purposes troubling your Lordships with reading the clauses, most unquestionably is very large in its operation. It includes franchises, it includes everything that can be conceived, and it gives a power of sale. There is no difficulty about that. Nobody would suggest for a moment that if this had been a security upon anything but a railway there would be any doubt about the right of sale.

LORD DAVEY: Is a power of sale incident to mortgages in Canada?

Mr. BLAKE: I think that a power of sale is universally inserted in mortgages in Canada.

LORD DAVEY: But is it incident to it without expression ?

Mr. BLAKE - There is a power of sale in the mortgage, and the Courts of Equity in Canada give a mortgagee a power of judicial sale.

LORD DAVEY: I forgot there was a mortgage by Deed. I thought it only rested on the charge in the first deed.

Mr. BLAKE: Yes, my Lord.

LORD HOBHOUSE: Is this the document at page 65 ?

Mr. BLAKE: At page 65. *Redfield* v. *The Corporation of Wickham*, which is a decision of your Lordships' Board to be found in 13 Appeal Cases page 467, was a case in which the conditions differed very largely from the conditions here, inasmuch as the right which was being asserted in that case was the right of a judgment creditor under his execution to sell a section of a railway. The Court held that according to the jurisprudence and policy of Canadian law, the decisions, so well known here, of *Gardner* v. *London Chatham and Dover Railway Company*, and *re Bishops Waltham Railway*, and that line of cases, did not apply, and went the length of holding that an execution creditor could sell, and could sell a section, although the section must be some such part of the railway as was saleable and capable of being severed without disintegrating and rendering unworkable the undertaking. I need hardly say that that is a decision which goes infinitely beyond the exigencies of this case, because that is a decision which gives a right to an execution creditor to have execution of his judgment by a sale of the railway, whereas all that I am called upon to establish is a proposition infinitely less, and lying far within this decision, namely, that where that contractual relation has been created by deeds authorised by or afterwards confirmed by Acts of the Canadian Legislature, there the power of sale exists ; so that the proposition adjudged is inclusive to an enormous extent of the proposition which it is necessary to adjudge in this case.

LORD HOBHOUSE: Is *Redfield v. Wickham* a decision of the Supreme Court in Canada ?

Mr. BLAKE: No, it came from the Court of Queen's Bench of the Province of Quebec as far as I remember; I do not think it came from the Supreme Court.

LORD WATSON: Yes ; the case arose from an opposition, I think, to an execution under a judgment.

Mr. BLAKE: Yes; an opposition. I own my Lords if I am not too bold to say so, I should like to have had something to say with reference to the right of a judgment creditor to sell, upon which my learned friends may perhaps observe. But I hold that the principle of the judgment which deals with the policy of the Legislation in that country is directly applicable. The Court adverts in the course of the judgment to

provisions of the last importance in this particular connection. They refer to the Consolidated Railway Act of 1879, and that Act itself makes provision upon which the Court relies at page 476 of the Judgment, to this effect :—"If at any time any railway or any section of a railway be sold under the provisions of any deed of mortgage thereof, or at the instance of the holders of any mortgage bonds or debentures, for the payment of which any charge has been created thereon, or under any other lawful proceeding"—it was upon these latter words "or under any lawful proceeding" that the Board thought that execution was a lawful proceeding—"and be purchased by any person or corporation not having any corporate powers authorising the holding and operating thereof, the purchaser must, within ten days from the date of his purchase, transmit to the Minister of Railways and Canals an intimation of the fact describing the termini and line of route of the railway, and specifying the charter under which it had been constructed and operated. Section 15 provides that, until such intimation has been made and all information furnished which the minister may require, it shall not be lawful for the purchaser to operate the railway ; but that he may thereafter continue, until the end of the next session of the Parliament of Canada, to work the railway and to take tolls, upon the terms and conditions of the previous owner's charter, unless these are varied by a letter of licence, which the minister is authorised to grant. Section 15 makes it the duty of the purchaser to apply to Parliament during the next session after the purchase, for an Act of Incorporation or other legislative authority to hold, operate and run the railway. If the application proves unsuccessful, it is in the discretion of the minister to extend his licence until the end of the next following session of Parliament, and no longer. Should the purchaser, during the extended period, fail to obtain an Act of Incorporation or other legislative authority, then the railway must be closed, or otherwise dealt with by the Minister of Railways and Canals, as shall be determined by the Railway Committee of the Privy Council." I may say that for your Lordship's convenience a further small set of "Extracts of Statutes" has been lodged by the appellants and these sections are to be found on the second page of that supplemental lodgment—Sections 14, 15 and 16—so that they are available to your Lordships there.

LORD WATSON: Was the effect of the Dominion legislation, with regard to the railway in question, to bring it within the legislation of Canada ?

Mr. BLAKE: Its inevitable effect was to bring it exclusively within the legislation of Canada. "Comment upon these enactments would be superfluous. They do not suggest that, according to the policy of Canadian law, a statutory railway undertaking can be disintegrated by piecemeal sales at the instance of judgment creditors or incumbrancers."

LORD WATSON: Is that enactment in force still ? There were Canadian Acts which provided for the case of purchasing and transferring.

Mr. BLAKE: I have just read them. They are Sections 14, 15, and 16, which have been re-enacted under other numbers.

LORD WATSON: It is quite inconsistent with the grounds of Lord Cairns' judgment in *Gardner v. The Chatham and Dover Railway*.

Mr. BLAKE: I quite agree.

LORD WATSON: The decision rested mainly on the fact that the Legislation had made provision for the transfer of these undertakings.

Mr. BLAKE: That is the point. It is not for me to undertake the bold task of endeavouring to sustain your Lordship's view.

LORD DAVEY: You say this is *a fortiori?*

Mr. BLAKE: Yes, infinitely *a fortiori*, because we get a primary authority to make the mortgage with the power of sale covering everything, and we get confirmation of our mortgage by legislation.

LORD DAVEY: "If at any time any railway or any section of a railway be sold under the provisions of any deed or mortgage thereof." You are not driven to the words "under any lawful proceeding"?

Mr. BLAKE: No, upon which words, my Lord, as I conceive, the only question could arise. Then, so far, I have been dealing with it without expressly directing your Lordships' attention to the question——

LORD WATSON: The purchaser has all the powers, which were originally conferred upon the Company, of operating the railway if he gives a certain notice.

Mr. BLAKE: He is given a time which is a sort of "day of grace"—two sessions of Parliament. He must give the notice and he gets a licence, and upon getting that licence that is an authority to work while the supreme jurisdiction of Parliament is appealed to, and if he fails in the first session he has a second session, and if he fails in the second session then some arrangement has to be made by Parliament, or else the railway is to be closed. But it all shows a contemplation of a means of getting over the great difficulty of realising on the security. In a word, our legislation for a very long time has been legislation contemplating an absolute sale and alienation of railways as the result of the creation of mortgages and charges upon them. It was found that in the practical operation of that legislation to get a sale was made difficult by the want of an authority on any purchaser to use the road.

LORD DAVEY: The purchaser bought so much land and iron.

Mr. BLAKE: He would have bought so much land and iron, and could not have used the franchise.

LORD HOBHOUSE: I suppose the whole policy of the country is different to ours. They build railways out of bonds in Canada.

Mr. BLAKE: Bonds and Government and municipal grants.

LORD HOBHOUSE: And the shareholders contribute nothing?

Mr. BLAKE: The shareholders contribute nothing as a rule.

LORD HOBHOUSE: It is a mere speculation beyond the value of the bonds?

Mr. BLAKE: They contribute nothing as a rule, and very generally get as little. I think on both sides of the dividing line of North America there has been a custom to issue first mortgage bonds and second mortgage bonds, and there has been a custom to issue stock, which is the profit, which, of course, depends upon the character of the enterprise. If it is likely to be a sound enterprise in the future the stock becomes valuable. If not, it often remains as the stock of this Company is——

LORD DAVEY: Paper.

Mr. BLAKE: Yes, paper, spoiled by the printing of the certificate. Then I have so far dealt with the question of the power to sell irrespective of the power to sell a section; but that, of course, is in this case equally clear. In the original Act, as I have said, you find power to mortgage "the whole or any part." In the Consolidated Railway Act—the General Act to which I have referred—you have a provision contemplating the mortgage of a section: "If at any time any railway or any section of a railway be sold."

LORD MORRIS: What does that mean?

LORD HOBHOUSE: There is no definition of the word "section."

Mr. BLAKE: No.

LORD MORRIS: What does the "section of a railway" mean?

LORD SHAND: What is the date of this Act of which you have given us an extract?

Mr. BLAKE: 1883; my Lord. It was passed in the same session in which the private Act of 1883 was passed, which authorised us to mortgage the property or any part of the property. This Act was passed in that session. Then you find "A railway or any section of a railway." Now, to deal a little with that question, in *Redfield v. The Corporation of Wickham*——

LORD WATSON: You are professing to sell here by virtue of a power given by the contract.

Mr. BLAKE: Yes, my Lord.

LORD WATSON: And that is a power expressly to sell the first section?

Mr. BLAKE: Yes, the first division.

LORD WATSON: The question is whether it is competent for the Court to which you applied to direct a sale?

Mr. BLAKE: Yes, my Lord. Perhaps your Lordships will allow me not to anticipate my argument upon the competency of the tribunal.

LORD WATSON: Then the question is whether they should direct a sale of a small portion?

Mr. BLAKE: If your Lordship would relieve me from the first and second portion of my argument, and allow me to go on to the third, I should rejoice.

LORD MORRIS: What do you describe as a section?

Mr. BLAKE: I was trying to get a little light from the judgment of your Lordship's Board. "Comment upon these enactments" it says, "would be superfluous. They do not suggest that, according to the policy of Canadian Law, a statutory railway undertaking can be disintegrated by piecemeal sales at the instance of judgment creditors or incumbrancers; but they clearly show that the Dominion Parliament has recognised the rule that a railway or a section of a railway may, as an integer, be taken in execution and sold, like other immeubles, in ordinary course of law."

LORD DAVEY: A section of a railway would be a part of the railway which, by the Acts or instruments empowering the construction of it, has been treated as a separate integer for the purpose of mortgaging.

Mr. BLAKE: If it were at all necessary for me to enlarge the operation of "a section," as I think absolutely it is not in this case, with regard to what Lord Davey has said, and applying it to the circumstances of the case, I should have argued thus. I should have said that the Railway Company in the first instance, supposing the Legislature not to have intervened, having the same interest as the public has, which must be this, to see that the railway, if it is to be divided at all and severed at all, shall be conveniently divided and severed so that each of its parts may have a chance to maintain a separate and a profitable existence, might set out such a section as it pleased to set out.

LORD WATSON: It is exactly the same thing as that which, at a private sale, a person might be reasonably expected to buy.

Mr. BLAKE: And in case the railway through some sinister motive, or some error in judgment, had cut off such a section as could not be worked by itself, or had left, by the cutting off such a section as, once the cutting off was affected, could not be worked by itself.

LORD MORRIS: What do you mean by "could not be worked by itself"? Surely any portion could be worked by itself.

Mr. BLAKE: You could work a railway mile by mile if you had an indefinite quantity of money, and built separate engines and rolling stock, and transferred your passengers and freight from one to the other every mile, but for practical purposes it could not be done.

LORD DAVEY: Yes, you could work by through trains, paying the working company so much, and dividing the tolls.

Mr. BLAKE: Certainly; but one can conceive very small divisions, which would render it impracticable to work them.

LORD MORRIS: I understand it is made in sections. It is generally made by contractors in sections, but, once it is made, what do you mean by a "section"—what do you mean by the section from London to Liverpool?

LORD SHAND: There must be a meaning to be given to the word "section," because the statute uses it. It says, "If at any time any railway or any section of a railway."

Mr. BLAKE: Yes, my Lord. What I was trying to say was this——

LORD WATSON: It would appear, Mr. Blake, that Section 14 of the Act of 1879 in this Appendix of Statutes seems rather to contemplate that any part of the railway which the Company owning the line chose to make the subject of a separate mortgage becomes saleable.

Mr. BLAKE: That is what I was about to argue, my Lord, because I point out, first of all that the interests of the public and of the Company are identical, because it is their interest to make such a division as shall be a workable and reasonable division.

LORD MORRIS: I quite understand that they might segregate that which is valuable for their own purpose and make it into a separate entity.

Mr. BLAKE: Yes.

LORD WATSON: The only point it seems to raise is this. The section which I just referred to does not contemplate that there should be a right to mortgage and sell in parts—to sell the section separately mortgaged—to cut it up into pieces and sell it piecemeal?

Mr. BLAKE: No, that, of course, is a minor point from which I am sorry to say we are just at present a very long way, my Lord, and I hope it will never be necessary to reach it. The last word I will say upon this part of the case as to the

direction of the Company, is that the public is amply protected by the fact that the right of the purchaser is a conditional right.

LORD MORRIS: I only wanted to know what you suggested was the meaning of "a section"?

Mr. BLAKE: I suggest, my Lord, that, in general, if one argues at large and without reference to this case, because it is not necessary to this case, a section would be such a portion as the Company had determined to denominate as a section and had made a special mortgage of, the public being protected against any error by the fact that Parliament shall determine whether it shall be effective or not by refusing the licence.

LORD MORRIS: It is like the section from Liverpool to London. They can mortgage the section from London to Rugby, and they create a section if they mortgage.

[Adjourned for a short time.]

Mr. BLAKE: Then, my Lord, in the present case it is, of course, according to my view, a work of supererogation to discuss the subject of the meaning of "section," because in the present case, the Company having assumed to mortgage, and to mortgage with a power of sale, therefore contemplating severence of the first division or portion of their railway of 180 miles extending to Langenburg, and that mortgage having been twice confirmed by Acts of the Legislature, that necessarily involves the proposition that that is an adequate section within the meaning of the Act, and if there were any suggestion possible to be made that it was not a fit section, the issue would be upon the respondents to have set that up and have proved something which should make it not a section within the authority of the Act of Parliament, a thing which they have not attempted to do. I contend, therefore, that the security created a power to sell the first division.

LORD SHAND: You have a copy of the security you say?

Mr. BLAKE: Yes; at page 65 of the Record. I am about to attract your Lordship's attention to it.

LORD HOBHOUSE: You are now on the question whether in its nature the railway is saleable.

Mr. BLAKE: Whether in its nature the piece is saleable. If the whole railway would be saleable under like powers to those given by these securities, this piece is saleable under these securities. And again I make this suggestion with regard to the 170½ miles, a portion of it——

LORD HOBHOUSE: That is the part in the Province.

Mr. BLAKE: Yes; If it should turn out as the result of the arguments on the the whole case that there is some insuperable difficulty in obtaining a decree, or in realising upon the 180 miles, then I am going to suggest to your Lordships that the 170½ miles can be sold, because it is an integer, being that portion within the Province of Manitoba. I ask your Lordship to remember that that 170½ miles within the Province of Manitoba was the whole railway. The whole authorised railway was from Portage la Prairie to the boundary of the Province of Manitoba. It was not a section, because it was all, and what the Dominion Parliament did was to authorise an extension of that railway beyond, and therefore in the nature of things, not merely is there no evidence against it but in the nature of things it seems extremely difficult to contend that that is not a satisfactory integer. But I hope, as I have said, that it will never be necessary to reach a decision on the point of anything else than the sale of the first division.

LORD MORRIS: In Manitoba was it held that the 180 miles could be sold?

Mr. BLAKE: Yes, I understand the Judgment is so. Their difficulty was in agreeing to a decree by a Manitoba Court, because it was a question of jurisdiction. But as I read the Judgment both the Judge of the original jurisdiction and the others held that it could be sold.

LORD MORRIS: That is, if the whole 180 miles happened to have been within the Province of Manitoba there would have been no question about it.

Mr. BLAKE: Yes. They did, in fact, order a sale of the moveables which were included in the security, on the ground that they were within the domicile and they were saleable, but they could not order the sale of the unmoveable because of this difficulty of the 9½ miles being out of the Province.

LORD WATSON: They held that they had no power to authorise the sale under the precise terms of the mortgage.

Mr. BLAKE: That is what Chief Justice Taylor says.

LORD WATSON: What was the order that they finally gave, from which you appeal?

Mr. BLAKE: An order continuing the receiver, and making a declaration with reference to the working expenses, which is the point that I was about to come to.

LORD WATSON: The question of expenses?

Mr. BLAKE: Yes, my Lord. As I way saying, I have stated this very briefly, as I understand your Lordship's general rule with reference to the argument is, that it

is not the duty of the appellant in the first instance to argue at large a proposition on which the Court below is in his favour.

Now, I come to the second set of questions into which I stated to your Lordships the argument divided itself, and that is, first, whether the revenues of the first division are, as against the Appellants prior to sale, charged with the working expenses of the whole line constructed or to be constructed, or only with those of or incidental to the first division? and, next, how is this after sale and when the first division is in the hands of a purchaser?

LORD SHAND: What is your contention about that?

Mr. BLAKE: My contention is that the working expenses which are made preferential, or subject to which the bonds exist, are the working expenses of the first division and not the working expenses of the whole railway.

LORD HOBHOUSE: You say that they should be apportioned?

Mr. BLAKE: Yes, ultimately they must be apportioned, because the moment there is a sale the property is severed—the purchaser gets the 180 miles and the Company works the remainder of the line. I contend that they should be apportioned *ad interim*, and that at any rate after a sale there exists no common working expenses at all.

LORD HOBHOUSE: The contention on the other side is that the expenses of the whole line are to be taken out before anything can be attributed to the bondholders of this portion?

Mr. BLAKE: Yes, so I understand—that the working expenses of the whole line are charges preferential to the bonds of the first division of the line; and that depends on the construction of the Statutes and the instruments.

Now, first of all, I ask your Lordships to consider what the consequences of the suggested construction would be. The assumption upon which we go is that there is power to mortgage a division——

LORD WATSON: If all the sections were mortgaged along the line it would lead to insuperable difficulty in going into the accounts.

Mr. BLAKE: Yes, I should think so. The assumption is that there is power to mortgage a division which becomes a separate security and divisible if there is default made, a sale ultimately taking place of the separate property, then altogether and absolutely divided. Until default it is a separate security. After default and after proceedings taken for a receiver, possession and so forth it becomes separate as to the fruits. And later on, if there is a sale, it becomes separate entirely and finally from the other portion of the road, and is to be worked by itself. How unreasonable a thing

it would be—how almost inconceivable a thing it would be, to create a charge on that separate part which is being so made separate, for the purpose of a security, for the working expenses of the residue of the line, and that a residue which was in no part at the period constructed; for even the whole 180 miles was not then constructed. A small part only has been, even as yet, constructed, for there are only 223½ miles of railway, including the first 180 even at this time constructed; but with reference to the excess—that is the 43½ miles—constructed, and to the probability, year after year, as the Railway Company determines, of the construction of further portions which will be put into operation, there is the possibility of this charge extending itself until in the end the whole 430 miles of working expenses is charged upon the 180 miles of the first division.

Now what are the working expenses? They include some very extraordinary and extensive charges; for example, in that little supplementary sheet of statutes which was handed in, on the first page, your Lordships will find extracts from the Amending and Consolidating Railway Act of 1879.

LORD DAVEY: It says what "working expenses" are for the purposes of this Act.

Mr. BLAKE: One cannot tell what working expenditure that precisely is, although I should venture to say——

LORD DAVEY: In this Act and in the special Act incorporating any railway company to which this Act applies.

Mr. BLAKE: Yes, my Lord, this Act does apply, except in such enumerated sections as are excepted, to the companies incorporated by special Act, and the obligation to keep a record of the working expenditure does apply to this Company, But I was about, at the moment, to refer to the 85th section—the second of the two sections which your Lordship will find set out here:—"The interest on the purchase money or rent of any real property acquired or leased by any railway company, and necessary to the efficient working of such railway, and the price or purchase money of any real property or thing without which the railway could not be efficiently worked, shall be considered to be part of the expenses of working such railway, and shall be paid as such out of the earnings of the railway."

LORD MORRIS: Does this question become of consequence unless you hvae decided in your favour the question as to a section?

Mr. BLAKE: Yes, my Lord, it would become of some importance for this reason. We are entitled at any rate to a receiver, and the question is what shall he receive. If there is a deficiency on the working expenses of the remainder of the line, and they are to be paid out of the earnings of our division, we get less in that way.

LORD WATSON: The receipts of the line are apportioned.

LORD HOBHOUSE: It seems to me to be important, whatever view you may take of the sale, as long as the receiver continues.

Mr. BLAKE: I should think so. There is no objection to the receiver.

LORD MORRIS: What have they decided about it?

Mr. BLAKE: The Court above have decided that the working expenses of the whole line were a charge.

LORD HOBHOUSE: It must depend on the construction of the mortgage deed.

LORD DAVEY: And the Act.

Mr. BLAKE: There are the Act and the mortgage and the Acts confirming the mortgage.

LORD WATSON: It would come to this, that if a part of the line is saleable, the purchaser would get it, under an obligation to pay out of his receipts, as a preferential charge, the cost of working that or any section?

Mr. BLAKE: I do not hesitate to say that I should suppose that the security would be practically unsaleable. It is impossible to tell what it is worth.

LORD DAVEY: It is a charge on "its tolls and revenues derived from operating the said railway after deduction from such tolls and revenues of all working expenses.

LORD MORRIS: Then, to follow that up, you may have an excellent security now, but if the line is extended for 100 miles, your excellent security would vanish.

LORD DAVEY: But such revenues shall be pledged in the first instance to the payment of the working expenses of the railway." It is rather difficult to get over those words, is not it?

Mr. BLAKE: I am about to grapple with those words, and I hope to be able to get over them, but before dealing with them, I was just considering what sort of construction this was and what results would follow from your Lordships being constrained, if you were constrained to adopt it, for I think, after having considered these, it would be only on the most stringent constraint you would adopt that construction.

LORD DAVEY: It may mean this, you know. It may mean it is the revenue received by the Railway Company before sale.

Mr. BLAKE: That is one of the suggestions I am going to make.

LORD DAVEY: Because after the line is sold and it is in the hands of somebody else, they are not then the revenues of the Company.

Mr. BLAKE: That is one of the suggestions I am going to make. But I was anxious, with your Lordship's indulgence, before reading the mortgage itself, just to point out a few general considerations as to what would be the effect of this suggested construction.

LORD DAVEY: Or "the working expenses of the railway" may mean the working expenses of the railway comprised in the mortgage.

Mr. BLAKE: Quite so. That is the other suggestion which I was going to make. Those are the suggestions which I have to make with reference to that. Now, I ask your Lordships to consider what the object was of the Railway Company giving this charge——

LORD SHAND: You have rather gone away from showing what you were about to show, what would be the "working expenses." I would be glad if you would pursue that. It does not want above a word or two, but I did not quite understand that Section 85, which declares that interest on the capital sum or rent of any property acquired by the Railway Company, and the price or purchase-money of any real property or thing without which the railway could not be worked, shall be "working expenses."

Mr. BLAKE: It is not easily understood.

LORD SHAND: That is Section 85.

Mr. BLAKE: We say the reasonableness is not very easily understood; but it is very important as considering how extensive it is. Here we are dealing with the working expenses of a railway as yet unconstructed.

LORD SHAND: Will you just read the words of the 85th Section?

Mr. BLAKE: "The interest of the purchase money or rent of any real property acquired or leased by any railway company, and necessary to the efficient working of such railway, and the price or purchase money of any real property or thing, without which the railway could not be efficiently worked——"

LORD WATSON: This is a long way from the kernel of the question. Can you refer us to any passage in these Acts where the expression "working expenses" occurs?

Mr. BLAKE: Which Acts, my Lord?

LORD DAVEY: It is called "working expenses."

Mr. BLAKE: "Expenditure."

LORD DAVEY: "Expenses."

Mr. BLAKE: Well, my Lord, in the clause that I am reading, if your Lordships had allowed me to read half a line further, you would have seen "shall be considered to be part of the working expenses of such railway," which is very near working expenses.

LORD DAVEY: No doubt it is.

LORD HOBHOUSE: All that means is that as between interest account and capital account, these particular sums for rent and so on shall fall on interest account.

Mr. BLAKE: Yes, my Lord, but they are some part of the working expenses. You find that in the 1879 Act, and you find working expenses made a charge prior to the bonds. I maintain that it includes the items——

LORD WATSON: I see this, that in the Act of 46th Victoria, the Act of 1883 Section 3 contains a definition of the same kind. "For the avoidance of doubts working expenditure," &c., &c. [Reading the section.]

Mr. BLAKE: Yes, my Lord. I thought it would perhaps be convenient that I should attract your Lordships' attention to the sections which deal with "working expenses" one after the other, and I was dealing with the first one.

LORD WATSON: But about "working expenses" it may occur—I do not know whether it does or not—in some mortgage or other deed which is not an Act of Parliament.

Mr. BLAKE: I consider that the bonds are subject to the working expenses——

LORD DAVEY: Have we to consider what are "working expenses"? What we have to consider is how far the working expenses precede your mortgage.

Mr. BLAKE: Yes, my Lord.

LORD SHAND: I understood the argument suggested was going to show that the working expenses were so enormous that if this construction of the Statute be adopted you destroy the mortgage. For my part I should like to see really what the working expenses includes.

Mr. BLAKE: Very well, I will state it as shortly as I can.

LORD SHAND: We have partly got them in these two sections.

LORD WATSON: Where do we get Section 5 of the Act of 1883.

LORD DAVEY: On page 24. You will see a proviso at the end which makes the "working expenses" a charge.

Mr. BLAKE: Your Lordship finds the Act of 1883 Section 3 states what the working expenditure includes.

LORD DAVEY: The proviso is "such revenue shall be pledged in the first instance for the payment of the working expenses of the Railway."

LORD HOBHOUSE: Then you have got a subsequent Act confirming the actual terms of the mortgage.

Mr. BLAKE: Yes, my Lord.

LORD HOBHOUSE: The terms of the mortgage seem to me to be most material for consideration, but however it is very useful—in fact necessary—to have the expressions of the Acts.

Mr. BLAKE: Yes, my Lord; but if it were permitted me, I should have liked to have just shown your Lordships, as I say, a little more at large what the results would be of the suggested construction.

LORD HOBHOUSE: I should like to hear it for one.

Mr. BLAKE: Because I think in applying oneself to the question of what the construction is, it is not unimportant to see what the effect is of one construction or of the other construction. As I was saying to your Lordships, we have to deal with the case——

LORD DAVEY: You are trying to prejudice our minds.

Mr. BLAKE: I am trying to inform your Lordships' minds.

LORD HOBHOUSE: You say if there is ambiguity the most probable result is the true result.

Mr. BLAKE: I should have thought so.

LORD HOBHOUSE: That is the sort of argument.

LORD DAVEY: You must first show us your ambiguity.

Mr. BLAKE: Well, my Lord, if your Lordship prefers that I should postpone it——

LORD DAVEY: Do not let me put you out.

Mr. BLAKE: The object of the charge by the creation of this mortgage upon the first section or division, instead of a mortgage which was subsistent over the whole line, whereby an equal rate of burden should be imposed upon the whole line as the residue of the line was being constructed, was to improve the security for the first division. That was the purpose with which they mortgage that. They found they could not get on, and they therefore make a security on that part of the line which is nearer civilization——

LORD WATSON: Taking these two definitions of "working expenses," one in the Act of 1883, the Consolidated Railways Act, and one in 51st Victoria, cap 86, which is for the purposes of that act and any special act incorporating any railway company to which the Act applies, I should say what was intended to be defined there by the words "working expenditure" is the mere working expenses. They intended to define what was, in the accounts of the Company to be published, to be regarded as capital, and what was to be regarded as revenue expenditure.

Mr. BLAKE. I had thought that all these sections would have a bearing on the question.

LORD SHAND: Are the two terms "working expenses" and "working expenditure" correlative?

Mr. BLAKE: I should have thought them practically one. One of them has a syllable more in it.

LORD SHAND: Well, it is a variation of the other.

Mr. BLAKE: They are always doing that over there, and I am afraid they are not altogether free from it over here. The object was, as I have said, to give a better security—a security on that part of the line which was nearer civilisation and had a larger population, and over which therefore more traffic would run—that part which, in addition to its local traffic, would tap the extension as it was constructed, and that primary object of this change, making it a mortgage of the first division, would be thwarted if it were provided that the earnings of the eastern part, the first division, should bear the losses of the western part—223 miles, which was to cost nobody knew how much and which would return nobody knew how little. The revenues under the new provision, as construed by the Respondents, would be limited to 180 miles, but the liabilities charged upon those revenues would be extended to 223 miles; whereas, as it was, at any rate you had the same measure of revenues and liabilities. If you had 223 miles of liability you had 223 miles of revenue. Again, the mortgagees of this section would have no control whatever over the expenditure on the 223 miles. The charge is a charge, according to their construction, of the working expenses of the 223 miles as well as the 180 miles. Now there are very many ways of running a railway, and what way would be adopted of running the 223 miles if the first division was to stand the expenses of the remainder, it is perhaps not very difficult to conjecture. There are all kinds and qualities of rolling stock; all kinds of variations in the line and circumstances of renewal; all kinds and degrees of quality of service and frequency of trains

and the speed of trains, altering to an enormous extent the weight of the burden ; and yet that burden is to be imposed upon this theory : that that unknown and unascertainable burden which is not controllable by the first division is to be imposed upon the earnings of the first division. There is no provision for the control of the expenditure. Again, one would like to know what this construction is. Does it mean that the revenues of the first division are responsible for the gross working expenses of all ? If so, see what the result of that would be.

LORD DAVEY : There would have to be an apportionment, of course ?

Mr. BLAKE : Well, if it is for the deficiency only, then there must be cross accounts. You must incorporate in this mortgage a provision for making them responsible for the deficiency on the working expenses of the line ; for some method of controlling the expenses on the other part of the line ; for cross accounts determining what that deficiency is—all sorts of details which are not provided for.

LORD DAVEY : *Prima facie* it would be a mileage apportionment, would not it ? If this 180 miles is a third of the railway—I do not know whether it is a third or a sixth—they would bear a third of the working expenses.

Mr. BLAKE: Oh ! my Lord that would never have served, with submission.

LORD DAVEY : *Prima facie* it would be.

Mr. BLAKE: Well it might be, but your Lordship must remember that one is not dealing with familiar conditions here. You are dealing with the conditions of a new road not yet constructed, into a territory mostly unsettled. You are dealing with conditions in which one train a week is all that is run and perhaps more than ought to be run in parts, whereas when you get to the eastward part, several trains in a week, or, for all I know, several trains in a day may be required. The suggestion of equalisation, by determining what the expenses were per mile all over the line, I think would not at all answer.

LORD MORRIS: I think if we once solve the clause on which the thing turns you can double back upon this. It is very unlikely that they would have passed such a clause, but if they did *a priori* arguments would be of no use, but one would appreciate it so much more if you solved the difficulty in question.

Mr. BLAKE: I am entirely in your Lordship's hands and am most anxious to take that course which your Lordships deem most convenient. I will turn to the Act of 1883 and reserve the very few words which I was about to have added on this point.

LORD WATSON: What are the words which are said to constitute this a charge on the interest which is mortgaged to your clients ?

LORD HOBHOUSE: The bonds of 1883 are gone, are not they ? They have been all either paid off or surrendered.

Mr. BLAKE: Yes, and so it is recited.

LORD HOBHOUSE: Then it is the bonds of 1886?

Mr. BLAKE: Yes.

LORD HOBHOUSE: Which are governed by the terms of the deed?

LORD WATSON: There is no doubt that the expenditure of the railway is to be made a charge on the revenues, but that does not, in the least degree, show that when property is mortgaged the expenditure on the whole of the railway is to be made a charge on that part. It does not necessarily?

Mr. BLAKE: That is the general view which I think would have struck anybody, and which I was endeavouring a bit to heighten by some statement of the considerations of inconvenience which would follow from the other construction.

LORD WATSON: I have great difficulty in giving intelligent consideration to the point until I see or hear the words which are said to raise that charge—whether they are statutory or not.

Mr. BLAKE: I am about now to reach that point. The first material thing is the Act of 1883 on page 24. The material clause is Clause 5 of that Act.

LORD DAVEY: That is the power under which the mortgage deed was executed?

Mr. BLAKE: The Act speaks then, first of all, of "a power to issue bonds, and "it provides that the bonds authorised to be issued shall, without registration or formal "conveyance, constitute a first mortgage upon the said undertaking and upon the said "railway constructed and to be thereafter constructed, and upon the property of the "Company acquired or which may be thereafter acquired (excepting therefrom municipal "bonuses), and upon its tolls and revenues derived from operating the said railway after "deduction from such tolls and revenues of all working expenses and upon the franchises "of the Company, save and except as is hereafter provided for." So far your Lordship will have observed that the authority is to issue bonds upon the whole railway.

LORD WATSON: It deals with the entirety.

Mr. BLAKE: Naturally no question could arise as to the meaning of the words "working expenses," since the security is on the whole enterprise.

LORD DAVEY: The "working expenses of the railway" here must mean the working expenses of the whole railway?

Mr. BLAKE: I should say so on the very principle upon which I proposed to limit them later on.

LORD DAVEY: Yes.

Mr. BLAKE: Then "Notwithstanding anything in this Act contained, the "Company may secure the bonds to be issued by them by mortgage deed, creating such "mortgages, liens, and incumbrances upon the whole or any part of such property, assets "and revenues of the Company, present or future, or both, as shall be described in the "said deed." There there is a power to mortgage all or part, "but such revenues shall "be pledged in the first instance to the payment of the working expenses of the railway."

LORD DAVEY: That is to say it is the same expression as you had before?

Mr. BLAKE: Yes, my Lord, subject to new conditions.

LORD WATSON: There is a right to grant bonds securing the balance of the tolls and revenues after meeting what has been expressed. There is no power to mortgage anything else—no power to mortgage the entirety of the receipts, but only the balance surviving after paying the working expenses of the Railway.

Mr. BLAKE: But Lord Davey's question is whether that means the working expenses of the whole railway, or only of that section.

LORD SHAND: As the clause stands it must mean the whole railway.

LORD DAVEY: It may mean that you ascertain, as you would in England, the fruits of the undertaking after paying the working expenses.

LORD WATSON: Well, it may come to this, that the power given to mortgage the tolls and revenues is absolutely nugatory if, when mortgaging a small part of the tolls and revenues, you are bound to deduct from the gross receipts for that part of the line the whole of the working expenses of the railway.

LORD DAVEY: You would have to deduct the working expenses of the other sections too.

LORD HOBHOUSE: But is this the Act that governs the question? I thought the bonds issued under this Act were all gone and that they were bonds issued under a subsequent Act which confirmed the mortgage.

Mr. BLAKE: But——

LORD WATSON: You may take this surplus of the revenues after meeting the expenses and divide it into parts, which you may mortgage, but I do not see how you could possibly mortgage the whole in those different parts, if you introduce the stipulation that the receipts of each part of the line as mortgaged were to submit to a deduction of the whole expenditure of the whole railway.

Mr. BLAKE: I hold, my Lord, that it makes the whole thing impossible, but I shall revert to that part of my argument when I have dealt with this part.

LORD DAVEY: It would only put it in the same position as an English railway mortgage, that is all.

LORD SHAND: If I may venture to say so, the observation made by Lord Hobhouse seems powerful: if these bonds are not issued under this Statute we had better see the other.

LORD DAVEY: The power to mortgage is derived under this Statute.

LORD SHAND: I understood Mr. Blake to say that they were not under this Statute.

Mr. BLAKE: No, my Lord, I did not. I am not able to say that. It is true, as Lord Hobhouse has said, that a certain set of bonds which were issued under this Statute were cancelled, but the first set of bonds upon the entirety were issued under this Statute.

LORD WATSON: I want to clear my mind about this. The Act of 1888 which is quoted in the separate appendix, which also contains a definition of the words "working expenses" applies, and the definition applies, as I understand, to every special Act incorporating a railway Company which is within the sweep of that Act, of 1888. "In this Act"—that is in the Act of 1888—"and in the special Act incorporating any railway Company to which this Act or any part thereof applies, unless the context otherwise requires the expression 'working expenditure' shall mean"——

Mr. BLAKE: Yes, my Lord. The question which would arise on that discussion would be how far this Act which was *ex post facto*, and which was in 1888, whilst these securities were in 1886, would be held to alter——

LORD DAVEY: Mr. Blake, we have not got to determine the question whether this definition of "working expenditure" applies to this Act or not or to this mortgage or not. We have nothing to do with that, have we? We have not got to decide that question. I mean there is no question in this appeal upon what "working expenses" is; but, there being working expenses, whether they are prior to this mortgage or not is the question—not what the working expenses are?

Mr. BLAKE: I had put on one side for a time the consideration of what the working expenses are.

LORD DAVEY: I do not see how the Act of 1888 can help us to construe the Act of 1883.

Mr. BLAKE: I ventured to make that suggestion in answer to Lord Watson, but this I venture to say, that whether that Act should be held to affect the construction of the Act of 1883, or of an instrument——

LORD DAVEY: I mean I cannot see how the definition of "working expenses" helps you to construe the meaning of "working expenses of the Railway."

Mr. BLAKE: I should have thought that an applicable definition of "working expenses" would have helped me to construe that. I should have thought it would have been relevant to the question what the construction is of another Act. Your Lordship suggests it is of no consequence at all to the interpretation of the instrument, what the quantum of the burden created by the working expenses may be. I had passed from that part of the argument for the time, but I am obliged to say that I do not see the close relevance of an Act of 1888 in interpreting the deed of 1886, and I do not put it forward, my Lord. I have not troubled your Lordships with it.

LORD WATSON: You see the power is to mortgage part of a surplus which is ascertained by deducting the working expenses from the receipts, and the difficulty, as it seems to me is this:—if you split that surplus, you can only do so by mortgaging the earnings of the part of the line, and deducting from the earnings of that part, the working expenses of the whole line, which is in no sense a part of the surplus. It is not only not a part of it, but it is not even its equivalent in money's worth. You may take it in this way—not necessarily. The receipts of the whole line, after deducting working expenses, may be £100, the receipts of the part of that line deducting its own working expenses might come to something like £20, but if you are to deduct from it the whole of the working expenses of the whole line, it may come to nil—or minus probably.

LORD DAVEY: You must deduct it from the whole of the receipts.

LORD WATSON: What in a reasonable sense is a part of the receipts so ascertained—coupled with a power of sale which there appears to be in this deed. That may affect it too. If it is bad this argument would go for nothing but if there is a power of sale, I suppose the purchaser would contemplate paying his own expenses.

Mr. BLAKE: Yes, my Lord, exactly.

LORD WATSON: They are no longer the working expenses of the line.

Mr. BLAKE: I was endeavouring to deal with the meaning of the Act of 1883 without the light which is given by the confirmatory Acts of 1886. My contention briefly upon that subject will be this: first of all, that the true construction of the Act of 1883——

LORD WATSON: You must keep this in view, that if there be a sale under the railway statutes that govern these Canadian railways, these statutes contemplate that a part or section of the line when sold shall become a new line under statutory authorization, because it is the duty of the purchaser to apply within a certain time for incorporation, to the Parliament of Canada.

Mr. BLAKE: Doubtless that is the machinery.

LORD DAVEY: It may very well mean this, that they have a mortgage on the railway and as a separate item they have a mortgage on the fruits of the undertaking so long as it is a going concern, but they cannot take the fruits of the undertaking without giving credit for the working expenses; but then when the thing is sold—when the railway itself, or a portion of the railway is sold, that ceases to be a part of the undertaking.

Mr. BLAKE: That is going to be my argument when I reach the question of the sale.

LORD SHAND: You are on the way to argue these other matters, as I understand it. I think you have not come up to them yet, if I may say so.

Mr. BLAKE: My intention is to do so. My intention will be, first of all, with reference to the general matters, to argue upon the power given by the Act of 1883 authorising a mortgage of the part, unembarrassed with reference to the subjection of the revenues——

LORD WATSON: If you sell a railway out and out there is an end of receipts by the Company, and there is an end of the expenditure by the Company, if you sell the whole thing from them.

Mr. BLAKE: Yes, my Lord, but unfortunately the interests of my client require that I should invite your Lordships to adjudicate on the condition of things before sale, because there is a very large interest——

LORD WATSON: I quite understand; that is your receivership.

Mr. BLAKE: Yes, my Lord, but if your Lordship wishes that I should proceed to deal with the question of the condition of things after the sale first, I will do so.

LORD WATSON: We are not dealing with three receivers, because the creditors would have their debt three times over by different receivers.

LORD SHAND: However, the question now is the effect of the Act of 1883 as I understand.

Mr. BLAKE: Yes, my Lord, I believe that if there be difficulty under the Act of 1883, it is, as Lord Hobhouse has observed, modified or removed by what happened afterwards, but I think I would like to begin by taking the Act of 1883 by itself.

LORD HOBHOUSE: Very well. I am sure I shall be very happy to listen.

Mr. BLAKE: My suggestion will be very brief. I shall not trespass long upon your Lordships' time.

LORD WATSON: I suppose you would not dispute this: that the charge upon the revenues of the part mortgaged is subject to a proportional payment of the "working expenses."

Mr. BLAKE: That that portion of the charge which is upon the revenues——

LORD WATSON: Should require to be in proportion. I think in the clause you have read, so long as it is in the hands of the Receiver it would require to be under deduction of an amount of the expenditure proportional to the amount of the receipts. If your Receiver has got a third of the receipts of the Company he would have to pay a third of the expenses.

Mr. BLAKE: I do not at all dispute that that portion of the charge, which is a charge upon the revenues, is subject to a prior charge in respect of working expenses, but I allege that that part of the charge in respect of working expenses, even before sale, has to do with the working expenses of and incident to the mortgaged division. These have to be paid, and it is in the nature of things that they should be paid, because how in the world can we get the revenue without paying the expenses of working the division? There is no hardship in that, there is no unreason in it. It is an essential ingredient in obtaining the fruit that the cost of manuring and tilling the ground should be paid. Then my argument on the deed itself is limited to this which I have made, that, whereas while you are dealing with bonds which could be executed *per se* without using the provision for a mortgage, only with reference to the whole railway and the whole undertaking, but one interpretation can be given to the words "working expenses." an interpretation which is natural; which is correlative; when you come to a provision that there may by a mortgage deed be created a mortgage lien or incumbrance "on the whole or any part," and you find that there is subsequently with reference to the revenues a proviso that they shall be pledged in the first instance for the payment of the working expenses of the railway, it is a fair and reasonable interpretation of "working expenses of the railway" there, to say it is the working expenses of the whole if it be the whole that is included in the mortgage, or of a part, if it be a part only that is included in the mortgage. That is the character of the argument I have to present to your Lordships.

LORD WATSON: The Court who decided in their Judgment that I have been reading at page 40 seem to have merely said that "the Receiver is hereby declared to "be, and since his appointment to have been, Receiver to so much of the revenues, "freight, tolls, incomes, rents, issues and profits of the Defendant Company's railway "and telegraph (as may be applicable to the first division of the Company's railway and "telegraph), subject to and after the payment of the working expenses of the said "Defendant Company's entire railway and telegraph." Did they mean to pass to the Receiver more than his due proportion of expenses?

Mr. BLAKE: They have. That is what they have meant to do, and what they have done, and that is what we object to.

LORD MORRIS: That is what you complain of?

Mr. BLAKE: That is what we complain of.

LORD MORRIS: I do not see it for an instant. I think it would only arise after sale.

Mr. BLAKE: No, my Lord, it arises most pointedly before sale. That is the reason that in stating the questions for your Lordships I said there was a case before sale and a case after sale, and different considerations apply. But the case before sale is not without very considerable importance to my client.

LORD MORRIS: This is the existing state of affairs?

Mr. BLAKE: This is the existing state of affairs, and it is practically important with reference to revenues which have been collected. There is something like £30,000 of earnings in the bank now awaiting the disposition of this question.

LORD DAVEY: Is the rest of the line not earning any revenue?

Mr. BLAKE: There are only about 40 more miles which have been constructed. The rest is all potential. There are the branches, but the branches have their own bonding arrangements. I am confining myself to this main line which we have been talking about.

LORD DAVEY: The working expenses are practically the working expenses of this section?

Mr. BLAKE: Well, there are 40 more miles, and it is only practically the working expenses of little more than this section, because they have not yet constructed more line. But if the misfortune should happen to my client of the Judgment being upheld, that the working expenses of the whole line constructed or to be constructed are a charge on the first division, I have no doubt a great many more miles would be rapidly constructed.

LORD DAVEY: It may be a charge on the first division, but it does not necessarily follow that it would be paid out of the revenues of the first division if there are other revenues equally applicable. If you have three subjects of mortgage all mortgaged for the same debt you apportion the debt between the three.

Mr. BLAKE: Yes, my Lord, I quite agree. I agree further. I agree that it is out of the bounds of possibility, looking at it from an abstract point of view, that the far end of this railway, yet unconstructed, can be the profitable part—the part which may pay the expenses of the whole. In truth there has been a deficiency in the far end, as far as it has been constructed, and there will be no doubt a deficiency in the farther end as it is constructed.

LORD MORRIS: There is 40 miles constructed beyond your part, and there

is no reason why there should not be 400 miles constructed into the wilds of Canada, and yet all the working expenses of that would be paid out of the profits of the first division.

Mr. BLAKE: That is the net result.

LORD MORRIS: That may be the effect of it.

Mr. BLAKE: It may be so; and it would be the result of it.

Then I wish to cite as *in pari materia* those sections which have been before your Lordships of an Act which was passed during the same session—the general Act which was before your Lordships in *Redfield v. The Corporation of Wickham*, passed in the same session of Parliament. The Legislature, dealing with railways and with this railway, passed those sections which I have read to your Lordships as to sales of railways, and looking at the words which are used, they are, "If at any time any railway "or any section of any railway be sold under the provisions of any deed of mortgage "thereof, and notice in writing shall be given that such purchase has been made, "describing the termini and line of route of the railway purchased, and specifying the "charter under which the same had been constructed and operated, including a copy of "any writing preliminary to a conveyance of such railway which has been made as "evidence of such sale; and immediately upon the execution of any deed of convey-"ance of such railway."

LORD WATSON: These seem rather to be a recognition really of the fact that a railway or a section of a railway may be mortgaged.

Mr. BLAKE: Yes, my Lord. I was only citing it for the purpose of showing your Lordships that, in a clause passed in the same session with reference to railways, where a suggestion was made of a sale of a railway or a section of a railway, later on in the same clause they speak of the railway purchased as "of such railway" and again "of such railway," which inevitably must mean a section if only a section is sold. Just as here the working expenses means the working expenses of the whole if it were the whole that was mortgaged, and of the part, if it were a part that was mortgaged; so in the 19th clause you find a section of a railway spoken of as being sold, and you have subsequently the phrase "of such railway" and "of such railway," which means the whole or a part according as it is the whole or a part which has been affected by sale under the prior portion of the section.

Then I turn to the argument that this has but a partial application—that the provision with reference to working expenses is limited to the charge upon the revenues. It is only when you come to deal with revenues that there is a pledge as to the working expenses. The provision is "that a mortgage deed may be made creating mort-"gages, liens, and incumbrances upon the whole or any part of such property, assets "and revenues of the Company, present or future, or both, as shall be described in the "said deed; but such revenue shall be pledged in the first instance to the payment of "the working expenses of the railway," so that the charge upon the other property and

assets is not a charge subject to working expenses. It is only when you come to deal with the revenues of the Company that the charge is made subject to working expenses, and that, of course, has a special application, so soon as that severence has taken place, which would take place even if a Receiver were appointed, or a mortgagee entered into possession under the terms of the deed which I am about to read ; and still more after a sale had been effected, and when a complete and final severance had taken place, when the revenue, as has been already observed from the Bench, would have ceased to be an entirety at all, and the working expenses would also have been severed. Then turning to the mortgage which was executed as it was supposed in pursuance of this Act.——

LORD HOBHOUSE : Is that the next document in point of date ?

Mr. BLAKE : Yes, my Lord. At page 65, I think it is.

LORD HOBHOUSE : There is the Act of 1886.

Mr. BLAKE : Yes, my Lord ; but the Act of 1886 was after the mortgage of 1886.

LORD HOBHOUSE : That was after, was it ?

Mr. BLAKE : Yes, my Lord. The Act of 1886 confirms the mortgage of 1886.

LORD HOBHOUSE : The mortgage was in April and the Act was in June.

Mr. BLAKE : Yes. The Act of 1886 is a confirmatory Act.

LORD SHAND : What page ?

Mr. BLAKE : Page 65 of the Record.

LORD SHAND : I thought you were coming to the clause ?

Mr. BLAKE : I am coming to the clause, my Lord, but I was beginning at the beginning. Before I come to the clause I would desire to refer your Lordship to page 69, at lines 38 and 39, which is the mortgage bond which is recited in the mortgage itself wherein the bond says that there is, "conveyed to the parties of the third "part as Trustees by way of mortgage free from incumbrances so much of the railway"— a description which certainly is inconsistent with the notion that it was conveyed to them charged with incumbrances with reference to the working expenses of the residue of the Railway. "By which Indenture there is conveyed to the parties thereto of the "third part as Trustees by way of mortgage free from incumbrances, so much of the "railway of the said Company built and to be built in the Dominion of Canada as extends "from Portage la Prairie to a point distant therefrom 180 miles measured along the "track of the said Railway under the authority of the said Acts, and all the property, "rights, and privileges forming part thereof or used and operated in connection therewith

"(other than Government land, grants, and Provincial subsidies) and all the stations, "fixtures, rolling stock, plant, and appurtenances thereof now owned or held or that may "be hereafter acquired, owned, or held by the said Company in connection with the said "portion of the said railway, the whole as described in the said Indenture of trust and "mortgage." That confirms the view that the intention of this mortgage was to convey the road free from incumbrances. It is a declaration that it is conveyed free from incumbrances.

LORD SHAND: I suppose no one disputes that? They do not call working expenses an incumbrance in the sense you mean.

Mr. BLAKE: The working expenses of the division itself would not be so.

LORD WATSON: There is not, in either of the Acts, and I do not know whether there is or is not in the mortgage which you are going to read to us, any suggestion of charging the road itself, but it is the receipts arising to the Company and assigned to them. Whenever the purchaser gets it none of these things suggest that there is to be a charge on the road. The receipts, the moment he becomes the purchaser, become his receipts and not the receipts of the Company. There is nothing to suggest, as I have seen, a charge on these receipts when the road becomes his property. That point is not decided by the Judgment.

LORD DAVEY. But it is made quite clear when you come to the provisions of this mortgage deed, Mr. Blake.

Mr. BLAKE: I hope your Lordship thinks it is quite clear with me, as I think it is.

LORD DAVEY: What I mean is this, that there are words here which explain it at length.

Mr. BLAKE: I think so.

LORD DAVEY: I mean at page 72.

Mr. BLAKE: What I venture to suggest to your Lordship is that we have to deal with the case before sale.

LORD WATSON: If it means what you indicated, which until I see the Judgment I have a little doubt upon, I see nothing of that sort. They do not use words which plainly express it.

LORD DAVEY: The words conveying the revenues are on page 72, line 8.

LORD WATSON: The words are "Subject to and after the payment of the "working expenses of the said Company's entire railway." Whether that means the

entire expenses of working the entire railway or whether it means a portion of those expenses is to my mind not debateable.

Mr. BLAKE: I do not know whether their Lordships in their decree carried out their Judgment, but that is what they intended.

LORD WATSON: I should have thought myself at liberty to read it as meaning a due proportion unless there was something in the opinion of the learned Judge who delivered Judgment which contradicted that view. It is the only reasonable view.

Mr. BLAKE: I agree it is the only reasonable view, but in that interpretation I am confronted by the adverse Judgment of the Court below.

LORD WATSON: If that is so, that is another question?

LORD DAVEY: Do you mean to say that they held that the mortgagees, say of other sections, can throw on your section the whole of the working expenses of the Company. I should not be inclined to believe that until I see it.

Mr. BLAKE: I tried to explain some time ago, my Lord, that I could not myself understand whether the intention was to throw the deficiency of the working expenses of the other part or to throw the gross working expenses of the other part on the first section, but certainly at least the deficiency, if any, is thrown, and I rather believe the effect of the learned Judge's Judgment is to throw the whole, subject probably to cross-accounting, about which there is no arrangement.

LORD WATSON: What they are authorised to assign to you is this. You have to go through the arithmetical or accounting operation necessary in order to arrive at it, which would be this: you would have first to ascertain what were the total receipts of the Company, secondly, to ascertain what was the total expenditure of the Company, to deduct the latter from the former, and ascertain what balance remained, and then to find out—that would be the last problem—what that balance arose from, whether the receipts within this section, in order to do which you would probably have simply to go back and ascertain what amount of the gross receipts arose from that, and consequently to deduct a proportional part of that expenditure. If it is a third then you deduct a third for expenses.

LORD SHAND: That is exactly what I understand you wanted to come to, Mr. Blake, but the Court were against you in the Court below.

Mr. BLAKE: Yes, my Lord, I might quarrel a little with the process Lord Watson suggests——

LORD SHAND: Is not it so, that the Court were against you on that.

Mr. BLAKE: I think so.

LORD SHAND: Counsel on the other side do not seem to think so.

Mr. BLAKE: I do not know what the views of Counsel on the other side are, but if the views of Counsel on the other side are that this charge is a charge simply in respect of the properly ascertained proportion of the working expenses of our own division, we have nothing to quarrel about—that is all.

LORD HOBHOUSE: At all events, you want to make that clear amongst other things.

Mr. BLAKE: Yes, my Lord, and up to this moment I have assumed that Counsel on the other side were contending for that. If I am mistaken no doubt they will relieve your Lordships at once from a very tedious argument.

LORD HOBHOUSE: I understand that is the contention.

Mr. BLAKE: The clause is at pages 71 and 72, and to assist in the exposition of it, it will be necessary to refer to Articles 2, 3, 6 and 18 later on.

LORD HOBHOUSE: The important part is when you come to the distribution of the revenues.

LORD DAVEY: Why not read the deed which gives the charge?

Mr. BLAKE: I was just going to do so.

LORD DAVEY: I thought you said it was necessary to refer to certain articles.

LORD HOBHOUSE: It shows what is to be spent when it comes into the hands of the Trustee. I cannot conceive anything more clear.

Mr. BLAKE: Yes; but I said it would be necessary to refer to other articles of the same Indenture.

LORD DAVEY: Let us take it by turns and read the deed.

Mr. BLAKE: Certainly, my Lord. I was about to do so. "Now this "Indenture witnesseth that the said Lord George Campbell Henry William Cobb and "Francis Douglas Grey by the direction of the Company (testified by its execution of "these presents) have and the Company has by way of confirmation and for and in "consideration of the premises and for the purpose of securing the payment of the bonds "so to be issued and the interest thereon as specified in the interest coupons thereto "attached, and every part of the said principal and interest as the same shall become "payable according to the tenor of the said bonds granted, bargained, sold, assigned, re-"leased, and confirmed, and by these presents, they the said parties hereto of the second "part and the said Company do and each of them doth grant, bargain, sell, assign, release,

"and confirm all and singular the first division or portion of the railway and electric "telegraph of the Company extending from the point of junction with the Canadian "Pacific Railway at Portage La Prairie in the Province of Manitoba to a point distant "180 miles therefrom measured along the track of the said railway as the same is now "located and constructed or in course of construction or as the same may hereafter "be changed located and constructed together with all and singular rights of "way, road, beds depôt grounds, and lands, used for the purpose of construction or "running of the said first division or portion of the said railway and telegraph, and all "tracks, bridges, viaducts, culverts, fences, depôts, stations, station-houses, engine-"houses, car-houses, freight-houses, wood-houses, machine-shops, and all other shops and "all other structures and buildings whatsoever now held and acquired or hereafter in "anywise held or acquired by the Company, its successors or assigns for use in the "construction, maintenance and operation of and for use in connection with the running "of such first division or portion of the said railway and telegraph, or of any part there-"of now owned by it or hereafter constructed or in anywise acquired excepting however "from such grant, bargain and sale, the municipal bonuses and the land other than afore-"said granted or to be granted by way of bonus or gift to the Company by the Govern-"ment, or by any corporation." Now that is the first division of the things granted. The second is: "Also by way of grant and not of exception, all the locomotives, tenders, "passenger baggage freight and other cars, and all other rolling-stock and equipment "whatsoever," and that sort of thing "for constructing, maintaining, operating, repairing "or replacing the said first division or portion of the said railway or telegraph between "the points aforesaid, or any part thereof, or any of the equipment or appurtenances "thereof." Then we come to the third: "And also by the revenues, freight, tolls, "income, rents, issues, profits, and sums of money arising, or to arise from the use of the "said first division or portion of the said railway and telegraph, or of the property "hereby conveyed or any part thereof, subject nevertheless to the working expenses "of the said railway and telegraph, and to all rates, taxes, and assessments and other "Government charges."

LORD DAVEY: There you observe that the working expenses is merely made a charge on the "revenues, tolls, income, rents, issues, profits, and sums of "money arising or to arise from the use of the said first division or portion of the said "railway or telegraph"—not on the railway itself.

Mr. BLAKE: Yes, my Lord, I thought that perhaps your Lordships would like to have heard all the subjects of grant. Now we come to the fourth: "Also all "rights, privileges, powers, immunities, and exemptions, and all corporate and other "franchises now owned, held and enjoyed by the Company, or hereafter to be held and "enjoyed or conferred upon it, its successors or assigns in any way connected with or "relating to the said division or portion of the said railway or telegraph constructed "and to be constructed. And the reversion and reversions, remainder and remainders, "thereof." There are the four different items, and, as Lord Davey has just observed, it is here perfectly plain, that while you have three different sets of subjects of grant and mortgage, no one of which is any way complicated with this question of the working expenses, you have one, "the revenues, freight, tolls, rents, issues, profits, and "sums of money arising or to arise from the use of the said first division or portion of "the said railway or telegraph or of the property hereby conveyed or any part thereof,"

which are subject "nevertheless to the working expenses of the said railway and "telegraph, and to all rates, taxes, and assessments and other Government charges."

LORD MORRIS: That is following out literally, almost the section of the Act of Parliament.

Mr. BLAKE: I think it is simply an enlargement of the Act of Parliament.

LORD MORRIS: Because the section of the Act of Parliament entitles them to mortgage the whole or any part of the railway and their assets and revenues, but in the case of the mortgage of revenues it is to be subject—that is the revenue is to be subject, not the assets nor the railway itself—to the working expenses.

Mr. BLAKE: Quite so.

LORD DAVEY: You observe one thing, Mr. Blake; what it is to be subject to is "the working expenses of the said railway and telegraph?"

Mr. BLAKE: Yes.

LORD DAVEY: Now that cannot mean that portion of the said railway and telegraph in this section, because if you look at the previous words it is "the revenues," reading it shortly, of this "first division or portion of the said railway or telegraph." "The said railway or telegraph" there clearly means the whole, and it is contrasted with a division or portion of the said railway and telegraph.

Mr. BLAKE: Of course I was not blind to the circumstance that I should have to grapple with that argument, which is the argument upon which the learned Judges below rested.

LORD DAVEY: I did not know that.

Mr. BLAKE: I was about to address myself to it at the earliest possible moment.

LORD HOBHOUSE: Is not that ambiguity cleared up by Article 3?

Mr. BLAKE: I was going to say so.

LORD HOBHOUSE: Which says how they are to distribute the money.

Mr. BLAKE: Yes, my Lord. The learned Judges stating their Judgment say this which Lord Davey has observed. You find "first division or portion," "first division or portion" and "first division or portion" and then "working expenses of the railway." They say that there is a sharp contrast, and that those words cannot be properly interpreted to mean the working expenses of the first division, and they say this is the only case in this instrument in which "the said railway" is used to mean

he first division or portion, and that being so it is clear that we cannot give it the nterpretation of the first division or portion in this case.

LORD WATSON: If it is limited to the expenses of the first division, I venture to doubt whether it would be within the terms of the Statute. If on the contrary it means a third, if it means to get at what you are entitled to, a third of the surplus revenue of the Company or the share arising from that agreement, it is the surplus revenue with which the Statute deals, after deducting from the total receipts the working expenses.

Mr. BLAKE: Of course I shall have to meet the difficulty your Lordship has suggested.

LORD WATSON: I think that is in substance what it meant.

Mr. BLAKE: I shall have to meet that difficulty.

LORD WATSON: There is a considerable difficulty in assigning that share or in splitting the surplus receipts into parts, when that operation requires to be first performed before ascertaining what the surplus receipts are. There is a difficulty in putting that into appropriate language.

Mr. BLAKE: I shall have to meet that question.

LORD WATSON: The Legislature was dealing with the whole, and then, referring casually to the parts, they got into that difficulty.

Mr. BLAKE: I shall have to meet the difficulty first of all, as to what the meaning of those words is in this mortgage, by considerations which arise upon the mortgage itself. I shall also have to meet the difficulty which Lord Watson has suggested whether, if the construction which I give your Lordships of the mortgage be the true construction, it is that which I say is intended by the Act on which I have already addressed your Lordships, asking you to give an interpretation to the words in the Act which would authorise such a construction of the mortgage as I submit. I shall have to meet it also by the observation that the mortgage, such as it is, is confirmed by subsequent Acts, and that, therefore, if I am able to prove to your Lordships that the proper construction of this instrument is in my favour, then it is a legalised instrument. That is where I shall come to after I have discussed the mortgage itself. But, first of all, with reference to the mortgage itself, I say, as I have said, looking no further than to this clause, not looking, as Lord Hobhouse has suggested I should do, and as I intended to do, to the other parts of the deed, I say that the language is quite susceptible of the interpretation, that working expenses mean those of that part which is charged, and that that is in truth the only reasonable interpretation. But I am able to show your Lordships that these words "the railway" have the significance which I have assigned to them in many other parts of the deed. I say that it was an entire misapprehension on the part of the learned Judges below to say that those words had not such an application—that they were not to be found elsewhere

in the deed, merely meaning the section. When I am able to show, as I am able to show, that throughout the deed the language is such that "the said railway" is used necessarily and obviously, as meaning only the part or division, then, of course, I heighten the strength of my argument, and render it easy to give to this phrase the same interpretation in this article which is obviously given to it in the other articles by their sense and meaning.

Now I turn to the second article, and I ask your Lordship to look at page 73 of the powers which are there given. At line 12 or 13 there is a power for the Trustees "to enter upon all and singular the said first division or portion of the said railway "and telegraph, and the premises hereby conveyed or intended so to be (acquired or "constructed and to be acquired or constructed), or any part thereof," and they are thenceforth "to have, hold, possess, and use the said railway and premises," not "the "said first division or portion," but "the said railway and premises." Just as we have got "the said railway" in the article of grant, I find "the said railway" used here, when obviously it means only the portion, because they are empowered to enter upon the portion thereof, and to hold, possess, and use the said railway or the said division.

LORD WATSON: The portion of the railway is not necessarily the railway in the ordinary sense of the term, but I think the section of the railway is meant.

Mr. BLAKE: I have already asked your Lordships to consider the first division or portion, legalised as that was by the Act of Parliament, as a section. I find "the said railway" used in this article in the passage which I have read out to your Lordships at line 16, where it obviously means the first division or portion. Then it says "with full power to operate and conduct the business of the said division or "portion of the said railway and telegraph by their superintendents, managers and "servants, attorneys, or agents, either in conjunction with the persons or companies "operating and conducting the other portions of the said railway, or otherwise, and to "make from time to time all repairs and replacements and such useful alterations, "advantages, and improvements thereof as may seem to them judicious, and to collect "and receive all tolls, fares, freights, incomes, rents, issues, and profits of the same, "and of every part thereof, and after deducting the expenses of operating the said "division or portion of the said railway."

LORD HOBHOUSE: That is what they have to do—to deduct the expenses of the working of that division.

Mr. BLAKE: Yes, my Lord.

LORD HOBHOUSE: They have not to deduct any other expenses as I understand, and it is pointed out how they are to apply the money.

Mr. BLAKE: I quite agree. I was only at the moment asking your Lordship to take this particular phrase, and I was going to come back upon that.

LORD HOBHOUSE: You want to argue on the one expression "the railway"?

Mr. BLAKE: Yes, I wanted to collect together for your Lordships' information the uses that had been made of "the said railway and premises," and pausing there without mentioning the other important argument which your Lordship has mentioned, I find at the very end, the surplus shall be "applied to the payment of the said bonds "upon a sale of the said railway and premises as hereinafter provided." The "sale of the "said railway and premises" means the sale of the first division of the railway there, so that I give your Lordship two instances in the second article—in an article which has the closest connection with and relation to this very question of working expenses—in which "the said railway" means the first division of the railway.

LORD HOBHOUSE: I suppose this is the article which would govern the Receiver in his application of the money?

Mr. BLAKE: I should have thought so.

LORD HOBHOUSE: The money is applied under this very power.

Mr. BLAKE: Then I take Article 3 in the same sense and for the same purpose. I need not revert to the other meaning and argument to be derived from these articles.

LORD SHAND: I should have thought one instance would be as good as half-a-dozen. If you are able to show that it has that meaning and that the sentence admits of that construction, that is enough. It is not a point that needs labouring I should think. If you have it there I think you have made the point.

Mr. BLAKE: Very well.

LORD DAVEY: I confess that if I am to decide on the construction of the deed I should like to have it read through.

Mr. BLAKE: Then Article 3 is in case default shall be made in payment of the interest. Once again there is a power of sale, of "the first division or portion." As Lord Hobhouse has observed, it is Article 2 which enables entry to be made, and Article 3 gives the power of sale. Then at line 24 it says, "And to make and deliver "to the purchaser or purchasers of the said railway and premises." Once again you have "the said railway" where it certainly means the first division or portion. Then at line 35 or 36 it says, expenses "in operating or maintaining the said railway and "premises," where it also means the first division; and it says, "prior to the lien on "the said premises." That is less material. Then at the end it says, "profits to arise "thereby to be applied to the payment of the said bonds upon a sale of the said rail-"way and premises," where it also indisputably means the first division or portion.

LORD SHAND: What line is that?

Mr. BLAKE: The last line of the article.

LORD SHAND: On page 75?

Mr. BLAKE: On page 75. The sale of "the said railway and premises" means the sale of the first division *ex necessitate.*

Now, one additional observation to show the absolute indifference with which the parties used "the said railway" and "the first division" as meaning the same thing. Take that passage to which I referred at line 34 or 35, "Expenses" and so forth "made or incurred by the Trustees in operating or maintaining the said railway "and premises." That means, of course, the first division; but let me turn back to line 25 of Article 2 on page 73 and your Lordship finds, "After deducting the expenses of "operating the said division or portion of the railway and telegraph," so that the same thing—the expenses of operating the division is spoken of as the expenses of operating the division in one, and is spoken of as the expenses of operating the railway in the other.

LORD HOBHOUSE: Do you mean by the other Article 3?

Mr. BLAKE: Yes.

LORD HOBHOUSE: It is the liabilities incurred by the Trustees "in operat-"ing or maintaining the railway."

Mr. BLAKE: Certainly.

LORD HOBHOUSE: That can only mean the division, and those are the only expenses they have to deduct.

Mr. BLAKE: I am quite aware of that, my Lord.

LORD HOBHOUSE: Then they apply the surplus to the benefit of the bondholders.

Mr. BLAKE: I am merely showing that the phrase "the railway" is used to mean "the first division" in the same clause, and for the same purpose in the one case, and "the first division" is used in the other—that they seem to be used indifferently, and that therefore there is no difficulty in giving the meaning of "the first division" to the word "railway," in case it is a reasonable and fair construction.

LORD HOBHOUSE: There is no strain on the words. "The railway" means the whole railway, or the railway the subject of the mortgage.

Mr. BLAKE: Then, my Lord, I come to Article 6.

LORD DAVEY: That is an important article.

Mr. BLAKE: Of course I shall have to come back upon these Articles for other purposes, but I come to it just in the same limited connection, and find how they describe the railway as a division of the whole railway. I find this in Article 6 on page 77, that where there is a provision for the purpose of ascertaining the proportion of the revenues and income derived from through traffic——

LORD DAVEY: Had not you better give us the purport of the article, because one cannot understand it from reading a few words in the middle of it. What is the effect of the article? It gave the Trustees power——

Mr. BLAKE: It gives the Trustees power from time to time to allow the Company to dispose of "such portions of the equipment, machinery and implements "at any time acquired or held for the use of the said division or portion of the said "railway and telegraph as shall have become unfit or unnecessary for such use. And "also power if and when they shall be in possession of the said division or portion of the "said railway and telegraph or previous to a sale thereof by them out of the assets in "their hands for the time being to expend such a sum or sums of money upon the "residue of the Company's line or to enter into such agreement in relation to the working "thereof as may in their or his discretion be necessary or advisable in order to promote "the traffic and to increase the revenue and income of the division or portion of the said "railway and telegraph comprised in this security, and for the purpose of ascertaining "the proportion of the revenues and income derived from the through traffic of the said "entire line and telegraph which is referrable to (and the proportion of the general "expenses of the said entire line and telegraph which ought to be borne by) the division "or portion thereof comprised in this security to submit to the same"—There, where it was intended to speak of the whole railway, you have got "the entire line of railway" twice over, and that is the phrase by which the draughtsman indicates the whole railway as distinguished from the part.

Now I turn back to these Articles for the other purpose, having shown your Lordships, as I have amply, that it was an entire misapprehension of the learned Judges in the Court below to say that this was the only occasion in the deed in which "the said railway" could be held to be used to mean "the first division." Having shown your Lordships that "the said railway" is obviously on many occasions in the deed—on most occasions in which it is used—used to mean the first division; and that, therefore, there is no such difficulty as they suggest in giving that construction. I ask your Lordships to consider a still more important argument derivable from these articles.

LORD SHAND: Is the finding of the Court on this point in a few lines to be found anywhere!

Mr. BLAKE: Yes, my Lord.

LORD SHAND: Will you be kind enough to read those lines so that one may see what you are grappling with, because I have not quite realised what it is?

Mr. BLAKE: Does your Lordship mean the Judgment or the decree?

LORD SHAND: No, I want it in the shortest possible compass. I should think the decree would be the best, so that one can see exactly what the point is.

Mr. BLAKE: The decree is at page 40 of the Record. "And this Court "doth further order and decree that the mortgage by the Defendant Company to "the Plaintiff referred to in the Bill of Complaint herein of the revenues, freights, "tolls, incomes, rents, issues, and profits of the first division of the Defendant "Company's railway and telegraph were mortgaged to the Plaintiffs, subject to "the payment in priority to said mortgage of the working expenses of the "Defendant Company's entire railway and telegraph, and that the appointment "of the Receiver herein to receive the revenues, freights, tolls, incomes, rents, "issues, and profits of the first division of the Defendant Company's railway and "telegraph be varied, and the said Receiver is hereby declared to be and since his "appointment to have been Receiver of so much of the revenues, freights, tolls, incomes, "rents, issues, and profits of the Defendant Company's railway and telegraph as may be "applicable to the first division of the Company's railway and telegraph, subject to and "after payment of the working expenses of the Defendant Company's entire railway and "telegraph."

LORD DAVEY: That means that the whole of the working expenses are charged upon the receipts of every part of the line, but it does not follow that when you come to work out the charge you throw the gross expenses or the whole of the expenses on any particular portion.

LORD SHAND: All I can say is it is very unhappily expressed in the Judgment.

LORD DAVEY: I do not see it. You may charge a debt on A B and C, and when you come to work out and realise that charge you apportion it.

LORD SHAND: If this does not exclude apportionment, and is intended to leave open apportionment, all this argument is unnecessary, because that is all Mr. Blake wants.

LORD DAVEY: He says it is not a charge. He says there is no charge.

Mr. BLAKE: I say it is not a charge at all. I say the charge is of the working expenses of the division.

LORD HOBHOUSE: You say that when the sale is effected the section is cut off and the rest of the line bears its own expenses?

Mr. BLAKE. Yes, my Lord.

LORD DAVEY: That is not enough for Mr. Blake. He says before the sale and when the Receiver is in possession there is no charge.

LORD HOBHOUSE: When the entry was made?

Mr. BLAKE: Yes. I make two contentions.

LORD MORRIS: Here they introduce the word "entire" and say the "entire railway."

Mr. BLAKE: I wish to make this observation, that this suggestion of apportionment may work out extremely unfairly. As a matter of fact I believe that there was a considerable deficiency in the earnings of the western portion or division for a considerable time, and there may be again as more is constructed. If the construction is that the whole of the working expenses are charged in the first instance upon the whole revenues or rather upon the revenues of the first division—or upon the whole revenues, although that is not the whole possible length——

LORD SHAND: Take it the whole.

Mr. BLAKE: I will take it the whole. Then if there is a deficiency in the earnings of the western end—the part not comprised in this security—to meet the working expenses of the western end, the working expenses of the western end having been paid out of the gross receipts of the whole, we cannot get back that deficiency.

LORD SHAND: On the other hand, if you take the other view, you might starve the other end entirely of the means of keeping it up. That is the alternative, you put to one side. The other is rather more startling to my mind than your proposition.

LORD DAVEY: I cannot conceive that the whole of the working expenses are not a charge on the whole of the revenues.

LORD HOBHOUSE: Yes, until the railway is severed.

Mr. BLAKE: All I can say is I want to find out from Article 2 what would happen——

LORD SHAND: It is not contended against you that that is the result of the Judgment. If you take the line as a whole and the receipts and expenses as a whole and strike a proportion, I understand that that is all that is contended for against you.

Mr. BLAKE: I really do not know. This is so limited.

LORD SHAND: I understand that is so.

LORD HOBHOUSE: Your Receiver is only to receive so much as remains after the payment of the working expenses?

Mr. BLAKE: Yes, my Lord.

LORD MACNAGHTEN: You do not suppose it is contended by the other side that if the western division was flourishing, and this was less flourishing, they could throw the whole of the expenses on this division?

Mr. BLAKE: I suppose they would not go so far as that.

LORD SHAND: You are contending practically for that proposition?

Mr. BLAKE: No, my Lord.

LORD DAVEY: That is what you were suggesting was the effect of the Judgment?

Mr. BLAKE: I suggested, my Lord, that the effect of the Judgment was either to charge in the first instance, subject to some cross account between the two divisions, the whole of the expenses upon the revenues of the first division, or to charge upon the first division the deficiency, if any, of the expenses of operating the remainder of the line, after applying to the operation of the remainder of the line its own earnings.

LORD MACNAGHTEN: That may be the result.

Mr. BLAKE: I should have thought it was an eminently unreasonable result, because it means this: that that which is intended to become a separate security——

LORD MACNAGHTEN: It is not a separate security. It is separate in one sense, but it is not separate for the purpose of relieving the charge as a charge on the whole until you sell.

Mr. BLAKE: I was about to have asked your Lordships' attention to the second article to see how that was. That is just where I was when your Lordships interposed.

LORD SHAND: I wanted to understand what the Court had held, and to see what it was, because that had not been explained to us, and it appears to me to be rather important in view of the most important part of the argument.

Mr. BLAKE: I read the decree.

LORD SHAND: This part I did not read before, or perhaps I did not notice it when you read it before. I think I now understand it.

Mr. BLAKE: I think I had better read it to your Lordship. I think it was on page 40.

LORD SHAND: I have got it now.

Mr. BLAKE: Very well. Then what is the condition after default and before "sale under the deed: "In case default shall be made in payment of any interest to "accrue on any of the aforesaid bonds to be issued by the Company when "such interest shall become payable according to the tenor of such bond or "the terms of any coupon thereto annexed and such default shall continue "for the period of three months or in case default shall be made in "the observance or performance of any other matter or thing in these presents "mentioned and agreed or required to be observed and performed by the Company and "such default shall continue for the period of three months then and from thence-"forth and in either of such cases it shall be lawful for the Trustees personally "or by their attorneys or agents to enter into and upon all and singular "the said first division or portion of the said railway and telegraph and the premises "hereby conveyed or intended so to be (acquired or constructed and to be acquired or "constructed) or any part thereof and from thenceforth to have hold possess and use the "said railway and premises and each and every part and parcel thereof then subject to "the lien of these presents with full power to operate and conduct the business of the "said first division or portion of the said railway and telegraph by their superintendents "managers and servants attorneys or agents either in conjunction with the persons or "companies operating and conducting the other portions of the said railway or otherwise "and to make from time to time all repairs and replacements and such useful alterations "additions and improvements thereto as may seem to them judicious and to collect and "receive all tolls fares freights incomes rents issues and profits of the same and of every "part thereof"—those are the tolls of the first division, not of the rest—"and after "deducting the expenses of operating the said division or portion of the said railway and "telegraph and conducting the business thereof and of all the said repairs replacements "alterations additions and improvements and all payments which may be made or may "be due for taxes assessments charges or liens prior to the lien of these presents upon "the said premises or any part thereof as well as just compensation for their own services" —And so on; that they shall apply the money to the payment of interest.

LORD MORRIS: In what way do you say it should work?

Mr. BLAKE: I say that the moment default takes place for three months, the Trustees were entitled to enter (and I suppose the Receiver's powers would be the same) and to work that portion of the railway on which the security is—the 180 miles. They are entitled to collect the earnings of the 180 miles, then they are entitled to deduct the working expenses of the 180 miles; they are entitled to make expenditure incident to and for the proper working; and, after making that expenditure and paying the working expenses, they get the balance, and that balance goes towards payment of the interest on our bonds.

LORD MORRIS: But that would have all happened if this were not in it on

your view of it. It says, "Shall in the first instance be applied to the working expenses "of the railway." You are making it a distinct railway, and of course the revenue would go towards the whole of the expenses of it—I mean of the section?

LORD DAVEY: It is only in case the Trustees operate—when they could have no working expenses except the working expenses of the division?

LORD MORRIS: You are selling a line. I understand that if the property is sold there is a new corporation created in the purchaser, who is at arm's length with the old Company, but when there is a Receiver you say that the Receiver is to collect the revenue and pay out of it the working expenses.

Mr. BLAKE: Of the division.

LORD MORRIS: That would show that the revenue would in the first instance be applied for the purposes of paying the working expenses of your section.

Mr. BLAKE: Certainly.

LORD MORRIS: That is what always happens.

Mr. BLAKE: Certainly. I perfectly agree that, if your Lordship adopts my interpretation of the first section——

LORD MORRIS: It renders it unnecessary to have that clause in it.

LORD WATSON: That 5th section is perfectly intelligible and requires no construction until you come down to the words, "and the Company may secure bonds "created by them by mortgage deed, creating such mortgages, liens and incumbrances "upon the whole or any part of such property." It is the application of those words, "any part" which leads to the whole of this discussion. How do you arrive at a part or ascertain a part of it? I have no doubt it is by the definition above that it means the difference in favour of the receipts above expenditure. That ties together the expenditure of the whole line and the receipts of the whole line. Now how do you divide that surplus into a part? There are a great many ways of doing it fairly enough. They may not be arithmetically precisely the same. I suppose if you cut up a railway it may cost a deal of trouble to ascertain precisely what amount of receipts have come from one part of the line because you may have to divide through fares and to go through a number of other calculations.

Mr. BLAKE: On a railway, the traffic of which is of a somewhat similar character over the whole length of the railway, a mileage proportion might be taken.

LORD WATSON: I do not think there is anything in the frame of that Act to suggest that the part of the tolls assigned is to be charged with the total expenditure of the whole.

Mr. BLAKE: That is my argument.

LORD WATSON: It says that the total receipts have to be charged with the total expenses, but when it says it may break it up, does not it mean that a part of the receipts is to bear a part of the expenditure?

Mr. BLAKE: At present I was asking your Lordship to agree with the proposition——

LORD DAVEY: The Legislature may have thought that the most important thing, as would be the case in England, was to provide for the railway being kept open, and that the mortgagee was not to deal with the revenue until the working expenses of the railway were provided for.

LORD WATSON: I think that is perfectly true.

LORD DAVEY: It would be the case in England.

LORD HOBHOUSE: Yes, but without the contract.

Mr. BLAKE: The question is, is it the contract, and the question is, whether it applies to a case like this, where at the time when this mortgage was made not even the whole 180 miles which was the subject of the mortgage was constructed. It is a potential railway—a railway in the future which is proposed to be charged; which may never be constructed, and which, when constructed, according to the ordinary experience, will produce very ill results for some time, no doubt. I was asking your Lordships to take this Article 2 as an exposition of what the measure of the rights of the Trustees was after default and before sale, as a measure which indicates plainly that they were to be enabled to receive the earnings of the first division, their security, and out of that to pay the expenses of working the first division, and out of it to pay further any other expenses that they thought necessary for the betterment or carrying on of that division, and after that to apply the difference in payment of the interest on the bonds.

LORD DAVEY: That is only where they enter and operate. You have never entered and you have never operated.

Mr. BLAKE: Well, my Lord——

LORD DAVEY: You have never entered or operated. This whole clause only applies to a power to the Trustees to enter and operate.

Mr. BLAKE: Yes, my Lord.

LORD DAVEY: And as to what they are to do when they operate. When they operate of course they can have no expenses except of operating that division. That is quite clear. But then you have not entered and you have not operated.

Mr. BLAKE: No, my Lord; but I do not think it material as to the construction of the granting clause——

LORD DAVEY: I express no opinion whether it is or not, but all that I say is that this clause applies to a totally different set of circumstances from that which has arisen.

LORD SHAND: I confess I would like to know whether on the other side it is maintained that the entire expenses of the line are to be deducted from the receipts of the portion.

Mr. ROBINSON: Certainly not.

Mr. BLAKE: I had thought that it was important, as aiding in the construction of the granting clause, to find that the intention of the parties was to make such a disposition before sale of the property, if the trustees entered, as would render it impossible to say that there was any charge in respect of the working expenses of the residue of the line.

LORD DAVEY: If this 5th Section were put into operation, there would be a severance of the section from the rest of the line just as effectually as if it were sold, and in that case the trustees entering into possession and operating it on their own account, could of course have no expenses except the expenses of their own operation.

Mr. BLAKE: Of course they could have no expenses but the expenses of their own operation.

LORD DAVEY: But where there is no severance of the undertaking and you merely put in a receiver, the circumstances are totally different.

LORD HOBHOUSE: But the mortgagees may without operating receive the tolls. I think they may collect and receive all the tolls. That is one thing.

LORD DAVEY: On their own operating I think that means.

LORD HOBHOUSE: I should think they could do what the Receiver is doing now. I suppose the Receiver only receives?

Mr. BLAKE: The suggestion I would make is, that if your Lordships agree that in case the trustees had entered and were operating they should be able to take the gross earnings of the division, to be applied in payment of the working expenses of the division, and such other expenditures as they choose to make, and as to the balance and the whole balance, to apply it in payment of the interest, then it is impossible to contend that any deficiency upon the working expenses of the remainder of the line is after that moment a charge upon the earnings of the first division——

LORD WATSON: It is a very difficult question, for this reason, that the first

part of the clause—I am speaking of the clause of the Act of 1883—evidently contemplates that notwithstanding the mortgage or assignment as a security of the receipts, the total receipts shall remain liable for the total expenditure ; but then it goes on to authorise, and that creates the whole difficulty in the matter, the empledgment of a part of the receipts Does that mean the empledgment of the part of the receipts already defined ? I do not think I entertain any doubt as to what it means. I have no doubt it does not authorise the charging of part of the receipts with the total expenditure ; but I am by no means prepared to say that if the outlay upon this part of the line was very small during the particular year when the receipts were in the hands of the receiver and the total expenses along the line exhausted the total receipts along the line, including those taken by the receiver—I am by no means prepared to say in that case the receiver would be entitled to retain the surplus in his hands as validly made over to the mortgagees of the section. I am not expressing an opinion upon that point, but I merely wish to say that my opinion is clear, so far. I do not express any opinion on the other part.

Mr. BLAKE: I was endeavouring to argue that that was the plain meaning of the article.

LORD WATSON: The object of the Legislature in sanctioning a transaction of that kind was this, that so long as the Company existed and was working the line, although the line was mortgaged, the public convenience should be served by the application of the receipts in the first place to the maintaining of the line, and the cost of conducting the traffic—that is quite another view, and raises quite a different question.

Mr. BLAKE: If I were able to satisfy your Lordship that Article 2 had the meaning, which is to my mind, its plain meaning, I think it would have an effect on the granting clause, and I think that your Lordship would also have to consider how far that is not limited, if otherwise that would have been limited, by the language of the Act of 1883, to which Lord Watson has referred, having regard to the fact that this mortgage is legalised and confirmed.

LORD WATSON: That is another question.

Mr. BLAKE: I know ; but it renders it necessary to try and find out what the meaning of the mortgage is, inasmuch as I contend that the mortgage, as it stands, is a legalised and confirmed mortgage.

LORD HOBHOUSE: It seems to me to turn on the terms of the mortgage, seeing that the Act confirmed it and the very terms of it.

LORD DAVEY: Does that legalise everything in it ?

Mr. BLAKE: I thought so, my Lord.

LORD HOBHOUSE: It gives the bondholders a security "which is hereby "ratified and confirmed." The mortgage is the thing they would see. I think anybody

buying bonds would look at that and think that the terms of the mortgage deed were to prevail ; I am sure I should.

Mr. BLAKE : That is what I thought, my Lord, and therefore I thought that having these two confirmations of the mortgage, I could rest with confidence upon the mortgage, even if the Act under which it was originally executed were of scanty or of doubtful authority. "The bonds secured by a mortgage on the first division of the "railway, which mortgage has been duly executed and is deposited in the office of the "Secretary of State, shall be hereby ratified and confirmed, and such bonds to the "amount of £3,000 sterling per mile of railway shall thereupon be the first lien and "charge on such first division of the railway comprising 180 miles as aforesaid, as "provided by the said mortgage deed." I should have thought that a person intending to take bonds under that would have said, "I have got a statutory mortgage."

LORD HOBHOUSE : I should have thought that Counsel in advising what the security of the bondholder was, would be guided by the terms of the deed. I should have thought so.

Mr. BLAKE : Therefore it was that we attached great importance to the terms of the deed as really evidencing what the true contract was. Then, when I find, as I have said, that at any rate the Trustees have the power to enter, and they have the power to allocate the whole amount of the earnings of the first division in a way which excludes any disposition of any part of those earnings towards the payment of a deficiency or of anything in respect of the working expenses of any other portion of the line, I find something which to my mind throws a general light upon the construction of the whole document, and which I should have thought would have measured the rights and powers of the receiver, if the Court appointed a receiver, in aid of the Trustees in lieu of them entering themselves—that his rights and powers would have been just such as the Trustees would have had if they had entered, with reference to the disposition of the receipts.

LORD SHAND : I suppose if you had a section of the line in possession in that way you could not work it without some arrangement with the persons who owned the remaining part of the railway.

Mr. BLAKE : You might, or might not ; and that is contemplated here, where it says that they may operate "either in conjunction with the persons or Companies "operating and conducting the other portions of the railway or otherwise."

LORD SHAND : Is that Article 2.

Mr. BLAKE : That is Article 2. It is either in conjunction or otherwise, and there are also other provisions which are important upon that subject later on.

LORD WATSON : There is an arrangement for dividing through fares.

Mr. BLAKE : Certainly, my Lord. There are provisions in the 6th Section which are closely relevant to this and which may be read in conjunction with the second article.

LORD HOBHOUSE: I suppose when the sale of a section takes place and it is duly licensed according to the Act, it becomes to all intents and purposes a separate railway.

Mr. BLAKE: No doubt.

LORD HOBHOUSE: A separate security.

Mr. BLAKE: The intention is to give a separate franchise by Parliament to the purchaser.

LORD HOBHOUSE: But the decree would prevent that. The decree says that the whole mortgage including the power of sale and everything is subject to the payment, in priority, of the working expenses of the entire railway and telegraph.

Mr. BLAKE: Doubtless.

LORD HOBHOUSE: So that no title can be acquired free from those expenses.

Mr. BLAKE: Yes certainly, it makes an inseparable relation between the different parts of the railway.

LORD DAVEY: It does not charge the railway but only the tolls and receipts.

LORD MORRIS: After the sale would not it apply to the tolls and revenues of that portion of the railway as I will call it?

LORD DAVEY: No.

Mr. BLAKE: I must correct myself. It is probable that the decree had no regard to the question of sale, because the Court determined that we had no power to sell.

LORD HOBHOUSE: It is a strange construction of the power of sale.

LORD DAVEY: It is only that they have a right to the revenues subject to the payment of the working expenses.

LORD MORRIS: It means both before and after sale. If it means after sale, surely you have a much more easy question to combat.

LORD WATSON: When a sale takes place and the security is given over, the *status* of the Company is at an end.

LORD SHAND: At the moment of sale you have a right of property.

Mr. BLAKE: Then——

LORD WATSON: The revenues dealt with in the Statute and dealt with in this mortgage are revenues arising to the Company—nothing else. It is a personal asset of the Company.

[Adjourned to to-morrow at 10.30.]

The above is a correct transcript of our Shorthand Notes.

(*Signed*) MARTEN, MEREDITH & HENDERSON,

13, New Inn, London, W.C.

In the Privy Council.

COUNCIL CHAMBER, WHITEHALL,
Thursday, February 11th, 1897.

GREY

v.

THE MANITOBA & NORTH WESTERN RAILWAY COMPANY OF CANADA

PRESENT—

The Right Honourable Lord WATSON,
The Right Honourable Lord HOBHOUSE,
The Right Honourable Lord MACNAGHTEN,
The Right Honourable Lord MORRIS,
The Right Honourable Lord SHAND,
The Right Honourable Lord DAVEY.

(Transcript of the shorthand notes of Messrs. Marten, Meredith and Henderson, 13, New Inn, Strand, London, W.C.)

[SECOND DAY.]

Mr. BLAKE: My Lords, when your Lordships rose, I was about to trouble you with a reference to the 6th article, which is to be found at page 77 of the Record, as bearing on and affecting the construction of the document with reference to the period before sale. Article 6, after giving certain other powers to the Trustees, which seem to me perhaps less material, at line 23 gives some powers on the occasion of the Trustees being in possession. "And also power, if and when they shall be in posses-"sion of the said division or portion of the said railway and telegraph, or previous to a "sale thereof by them out of the assets in their hands for the time being, to expend such "a sum or sums of money upon the residue of the Company's line or to enter into such "agreement in relation to the working thereof"—that is of the residue of the Company's line—"as may in their or his discretion be necessary or advisable in order to promote "the traffic and to increase the revenue and income of the division or portion of the said "railway and telegraph comprised in this security." So that you get a specific authority for the Trustees to spend moneys on the residue of the line or to enter into working agreements as may be necessary or advisable in their judgment to promote the traffic and increase the revenue of the first division.

LORD DAVEY: If and when they enter into possession?

Mr. BLAKE: Yes. I hold that the conditions which are recorded by the deed before sale, in case they should go into possession, are not immaterial in considering the meaning of the article.

LORD WATSON: There are three positions which this article relates to. It may be still in the possession of the Railway Company; it may be in the possession of the Receiver or the mortgagees; and it may have passed, according to the terms of the mortgage, into the hands of a purchaser. I do not think the instrument leaves any doubt as to the share of the profits applicable to the section in question, which is to be held by the Company for the behoof of the mortgagees and paid over to the mortgagees, but an entirely new set of circumstances arises whenever the mortgagees enter into possession by virtue of their mortgage. The arrangement for ascertaining the share of profits is not applicable to the arrangement for ascertaining the share of the profits to be paid by the Company to the mortgagees so long as they hold it, and the enactments that occur on page 73 appear to me to be the only enactments in the case of entering into possession. There is "full power to operate and conduct the business "of the said first division or portion"—it is limited to that—"of the said railway and "telegraph," and then at line 23 the power given them is this:—"To collect and receive "all tolls, fares, freights, incomes, rents, issues, and profits of the same, and of every part "thereof"—that is all confined to the said division—"and after deducting the expenses "of operating the said division or portion of the said railway and telegraph, and con-"ducting the business thereof, and of all the said repairs, replacements, alterations, "additions and improvements, and all payments which may be made or may be due for "taxes, assessments, charges, or liens prior to the lien of these presents upon the said "premises"—that is upon the section—"or any part thereof, as well as just compensa-"tion for their own services and for the services of such attorneys and counsel and all "other agents and persons as shall have been by them employed, the Trustees shall apply "the money arising from such collections and receipts as aforesaid to the payment of "interest on the said bonds." I do not find throughout that any direction that they shall pay any part of the working expenses on other sections.

Mr. BLAKE: That is precisely my contention, and I was rather confirming it by referring to Article 6, which is in the same condition. These are further arrange-ments applicable to just the same condition to which Article 2 is applicable.

LORD WATSON: You are raising two questions. Firstly, whether the receipts of that part of the section are protected in the hands of the mortgagees when in possession. And, secondly, whether they will prejudice the right of the purchaser who acquires it.

Mr. BLAKE: Yes! The second point I have not dealt with. Then perhaps your Lordships will permit me to read the remainder of Article 6, "or to enter into "such agreement in relation to the working thereof as may in their or his discretion be "necessary or advisable in order to promote the traffic and to increase the revenue and "income of the division or portion of the said railway and telegraph comprised in this

"security, and for the purpose of ascertaining the proportion of the revenues and income, "derived from the through traffic of the said entire line and telegraph which is referrable "to (and the proportion of the general expenses of the said entire line and telegraph which "ought to be borne by) the division or portion thereof comprised in this security, to "submit the same to arbitration, and to arrange with the Company or other the person "or persons interested therein a proper system of division by which such proportion may "be ascertained," so that when they are in possession and working the division, it is recognised there is or may be a through traffic in respect of which, no doubt, the tolls would be collected at one end or the other of the line, or in one section or the other section of the line for the work done over a different section.

LORD WATSON: That is merely for dividing such portion of the receipts as are rightly earned. It refers to through fares.

Mr. BLAKE: I agree.

LORD WATSON: The Legislature contemplated that though after taking possession there would be substantially two undertakings managed by two different authorities, the line is still to be operated for the convenience of the public as a through line.

Mr. BLAKE: Yes, or may be so operated; and provision is made for an adjustment of the expenses and of the receipts.

LORD WATSON: You could not very well claim a share of the receipts earned on the other part of the line without taking into account as a deduction from those receipts the outlay.

Mr. BLAKE: Yes, in connection with the through traffic. The ordinary arrangement is that a certain proportion of the rates is handed over. The Company that receives does not hand over the simple mileage portion to the other, but it hands over a larger proportion since the other bears a share of the outlay.

LORD WATSON: The usual method of dividing through receipts between large railway companies is simply to lump the outlay, but then haulage and carriage, and all expenses are divided according to mileage. That is only one way of doing it.

LORD HOBHOUSE: Those things are arranged when two Companies combine by the agreement by which they combine.

Mr. BLAKE: Yes.

LORD HOBHOUSE: This seems to me to give power to the mortgagees in the reverse process of severing one Company into two to enter into arrangements. only gives them power.

LORD WATSON: The arrangement in Article 6 refers exclusively to through traffic which passes not only over the section but also over the remaining parts of the line.

Mr. BLAKE: Yes. It is to be read in conjunction with Article 2 as indicating the whole character of the arrangements within the power of the Trustees and contemplated by the Act of the Legislature upon possession being taken.

LORD HOBHOUSE: Your contention is that instead of being subject to the working expenses of the entire railway, as the decree says, you are subject only to the expenses of your own division when severed from another railway?

Mr. BLAKE: Yes, and the only additional thing contemplated is that if there is through traffic which runs over both——

LORD HOBHOUSE: They may enter into an agreement for arbitration?

Mr. BLAKE: Yes. If they do not enter into an arrangement for through traffic running over both it is obvious the moment the car gets on that portion of the section a new arrangement has to be made by the consignor.

LORD WATSON: I do not know whether there is such an institution in Canada, but in this country it is done through the Clearing House. It depends on what carriages each train that travels is made up of. If all the wagons in the train belong to Company A, before dividing the traffic an allowance is made out of the receipts for the through traffic on account of those carriages.

LORD DAVEY: The order would be quite right if you put in the explanatory words, "Subject, together with the profits of the other sections of the railway, to the "expenses of working the entire railway."

Mr. BLAKE: That, of course, is not our contention. There are more than two situations. There is the situation anterior to possession taken by the Trustees or a Receiver, a situation which is adjusted by Article 18, to which I have now to direct attention before getting to the question of the sale. This is the article which provides in the form of a covenant by the Company that the Company will "in each and every "year ensuing the date hereof faithfully use and apply the net earnings and "income to be from time to time derived from the said division or "portion of the said railway and telegraph, or from any part thereof after dis- "charging its obligations upon or with respect to prior liens thereon, or so much "of such net earnings and income as may be necessary for that purpose to the payment "of the same"—that is the payment of the interest and principal of the bonds—"as and "when the same shall become due, until all the said bonds shall be fully paid and satisfied, "and that it will seasonably in each and every year pay and discharge all taxes and "assessments of every sort and description which may be lawfully imposed, levied, or "assessed upon all or any part of the franchises or other property herein and hereby

"conveyed or intended or contemplated so to be, so as to keep the mortgaged premises "free and clear from any incumbrance by reason thereof, and that it will from time to "time and at all times hereafter and as often as thereunto requested by the Trustees under "this Indenture, deliver and acknowledge all such further deeds, conveyances, and "assurances."

LORD WATSON: They are to keep down the interest on the prior mortgages.

Mr. BLAKE: It is a specific covenant to apply the income of the division in this way—not merely to pay interest but to apply the receipts of the division or net income of the division in this way.

LORD HOBHOUSE: That is before any severance at all.

Mr. BLAKE: Yes, before any severance at all. There is still an obligation to retain the net income of the division and apply it in case of the mortgagees, so that the mortgagees were always interested in the net income of the division.

LORD DAVEY: The question is, what is the net income?

Mr. BLAKE: I quite agree. I am ascertaining whether or not it was the form of the Indenture that there was always an interest in and a right to have an account of the net income of the division.

LORD HOBHOUSE: You have not reached the question, what is the net income?

Mr. BLAKE: No, my Lord.

LORD HOBHOUSE: There is a contemplated division?

Mr. BLAKE: Yes.

LORD WATSON: This is a covenant to do nothing in derogation of the right of the mortgagees.

Mr. BLAKE: What is the net income to be derived from, the division or portion is to be found, I apprehend, by the contentions I have already addressed to your Lordships on the other parts of the instrument, subject to this consideration, as is suggested, what is the true meaning of "after discharging its obligations upon or with respect to prior liens thereon." It is suggested that these words, in fact, indicate that there is a prior lien, or are adequate to cover a suggested prior lien in favour of the working expenses of the other division. Now the word "lien" upon which that argument is

raised is included in Articles 2 and 3, as well as in Article 18; and if your Lordships refer to the connection in which it is included, it will appear to be something which could be paid off—a bulk sum or charge to be cleared off altogether. Again, this article provides for the application of the earnings to the expenses of the first division and then to prior liens—not to the expenses of the whole—not to the expenses of the first division and any deficiency there may be on the working expenses of the other, but dealing with expenses it applies it to the expenses of the first division, and then to prior liens. But the question of expenses being dealt with in this language specifically does not, as I submit, come in in any other form under the words "lien prior to the lien of these presents." Those words mean a lien not created by the presents, whereas if the other interpretation is taken this lien for working expenses of the other parts of the railway would be one created by the presents. A lien prior to the lien of the presents is some over riding lien, as, for example, possibly for unpaid purchase money of lands, or possibly taxes and assessments which are made first and overriding charges. Article 3 provides for payment off on sale, and is not applicable to a continuous and perpetual charge, as the working expenses would be. That article, however, does not apply here, and I have prematurely introduced it.

Now, it has been suggested that these conditions to which I have referred as existent before sale are not material to be considered, because the Trustees did not actually enter into possession, but I submit that under the terms of the decree to be found at page 35 what the learned Judge does is this: In the first place the Court orders, "that the Receiver appointed in this cause of the revenues, tolls and profits of "the first division, or 180 miles of the Defendant's railway, be continued." Then, "that "the said Receiver do apply the said revenues, tolls and profits"—that is of the first division—"in accordance with the terms of the Indenture of the 16th day of April, 1886, "except in so far as such Indenture directs payment of any of such moneys to the "Plaintiffs, and that such moneys, if any, last referred to be paid into Court to the "credit of this cause to abide the further order of this Court." So that the Receiver was appointed in terms of this second article, with this exception, that whereas when a surplus was ascertained under the second article, if the Trustees had been in possession, it would have been received by them and payable over by them to the bondholders, instead of that the surplus ascertained according to the same measure is to be paid into Court to abide further order.

LORD HOBHOUSE: Are there any cases which show the position of sections of a railway which have been the subject of sale? It seems to me very great difficulties may arise. However, that is the plan they have chosen to adopt in Canada.

Mr. BLAKE: I am now coming to the sale.

LORD HOBHOUSE: I was only asking if there was any decision.

Mr. BLAKE: I am not aware of any decisions. Having concluded what I have to say on the condition of things arising before sale, I ask your Lordships to consider the condition of things after a sale, which, of course, is material to my clients.

LORD WATSON: Does the relief prayed include a sale?

Mr. BLAKE: Yes. The main relief was a sale, and the original decree ordered a sale. That was changed by the decree, which is now under appeal. Before I refer to Article 3, which deals at large with conditions arising after a sale, as Article 2 and Article 6 deal with conditions arising after possession taken and before a sale, I desire just to refer once again to the position, which has been more than once stated by various members of the Bench, upon the granting clause. As was pointed out early in the argument, that clause comprises four different subjects of grant, three of which subjects are granted irrespective altogether of any question of working expenses. The third in point of number of the four is the one which alone has regard to working expenses, whatever those terms may mean: "And also all revenues, freights, tolls, income rents, "issues, profits, and sums of money arising or to arise from the use of the said first "division or portion of the said railway or telegraph or of the property hereby conveyed, "or any part thereof, subject nevertheless to the working expenses of the said railway "and telegraph."

LORD HOBHOUSE: That is the fourth subject.

Mr. BLAKE: The third in point of number. You will find that specified at line 7, page 72.

LORD HOBHOUSE: The first division or portion of the railway and telegraph?

Mr. BLAKE: Yes; that's the first. The second is the moveables, passenger and freight cars, and so forth. The third is the revenues—subject, &c.—and the fourth are the rights, privileges, and other franchises at line 12. Those are the four things. Of the four No. 3 is of the revenues, and No. 3, being of the revenues, is that which alone contains this provision as to working expenses.

LORD WATSON: On page 20 there is stated a Petition by Grey and Maxwell, the present Appellants, presented on the 1st of November, 1893, and then the leading initial step appears to be a Bill of Complaint in the Queen's Bench Equity Court.

Mr, BLAKE: Yes. The circumstances were these. The judgment creditors of the whole enterprise had proceeded in the Equity Court, and had obtained process against the railway and a Receiver generally of the railway, and without the leave of the Court it was impossible to file a Bill tending to interfere with the possession of that Receiver. The first and initial proceeding was to get that leave. That was got, and on that leave this Bill was filed.

LORD DAVEY: Did the present Appellants get the Receiver?

Mr. BLAKE: No. The execution creditors got the original Receivership, which was of the whole line. Thus no further proceeding could be taken interfering with the Receivership except by leave. Then we applied and got the leave and proceeded.

LORD DAVEY : Proceeded with the division ?

Mr. BLAKE: To get our Receiver of what we were entitled to. I did not trouble your Lordships with those complications because nothing turns on them, so far as I can judge. Then I argue strenuously that whatever may be said of the condition of things anterior to a sale it is impossible to apply that to a condition of things under which there is a sale of—take number one of these subject matters—"the first division or "portion of the railway and electric telegraph of the Company as the same is located, and "the rights of way, road beds, depot," and so forth, "and all station houses and everything "for use in the construction, maintenance and operation of the first division"; "a sale "of all the personalty required for the same purpose"; "a sale of all the rights, privi- "leges, franchises, and so forth." After such a sale can it be said that there is anything on which this third member of the four subjects of grant can operate at all, because there you are alienating absolutely that out of which the revenues themselves grow.

LORD DAVEY : That seems to be the view taken in the decree, because the decree only confines the payment of the expenses to the revenues and tolls of the section. There is no decision against you on that point.

Mr. BLAKE: What it says is this. Of course this decree does not deal with the question of a sale, because this decree is based on the proposition that the Court had no jurisdiction to direct a sale. What the opinion of the learned Judges was as to what would be the consequence of a sale if they had had jurisdiction in their view to direct it is to be gathered from their judgments, but the language of the decree has regard to the period before sale.

LORD DAVEY : That is what I meant. There is no decision that after sale the profits in the hands of the purchasers would be applicable to the expenses of the entire undertaking.

Mr. BLAKE: There is nothing in the decree because there could not be. That is quite true. The decree had regard only to that which the Court thought they had jurisdiction to do. But the decree says "subject to and after the payment of the "working expenses of the said Defendant Company's entire railway and telegraph."

LORD HOBHOUSE: The decree relates to the construction of the whole mortgage, and seems to me to apply to a sale as much as to the receipts. It construes the mortgage, and if you carry your property into the market to sell under the mortgage you are subject to this decree.

Mr. BLAKE: I ought to have read a little bit more, "as may be applicable to "the first division of the Company's railway and telegraph, subject to and after the pay- "ment of the working expenses of the said Defendant Company's entire railway and "telegraph, but this Court does not see fit at present to declare the rights of any parties "in respect of such priorities after any sale of the first division of the railway."

LORD HOBHOUSE: That is inconsistent with the generality of the terms. This property was mortgaged to the Plaintiffs "subject," and so on.

Mr. BLAKE: I agree. It seems to me to be inconsistent with the statement, "subject to the payment in priority to said mortgage of the working expenses of the "Defendant Company's entire railway and telegraph."

LORD HOBHOUSE: If you effect a sale then a fresh state of rights may arise. I do not see how that declaration fails to operate.

Mr. BLAKE: I am afraid I shall have to leave it to my learned friends on the other side to render consistent the express statement that the mortgage is subject to the payment in priority to it of the entire working expenses of the Company, with the statement that there is no declaration of rights after a sale. What I am anxious to get is a declaration of rights after as well as before a sale.

LORD WATSON: There is nothing to determine what the rights may be after a sale. Mr. Justice Killam's decree says that the Receiver is to apply the revenues, tolls, and profits in accordance with the terms of the Indenture of the 16th of April, 1886, "except in so far as such Indenture directs payment of any of such money "to the Plaintiffs." The moneys you are claiming are directed to be paid into Court, and then he reserves the question whether out of those moneys any portion is to be applied to the working expenses of any other portion of the railway. By the 8th article of the decree it says:—"And this Court doth declare that it does not at present see fit to "determine whether the Defendant Company is entitled to have the revenues, freights, "tolls, income, rents, issues, profits, or sums of money arising or to arise from the use of "the first division or portion of the railway and telegraph and other property mortgaged "to the Plaintiffs, or any part thereof applied to the working expenses of any portion of "such railway, telegraph or other property not comprised in the Plaintiff's mortgage."

LORD DAVEY: I suppose the question had not arisen then.

LORD WATSON: The question was reserved apparently by the first Judge. Upon that part his judgment is reversed by the Appeal Court.

Mr. BLAKE: Your Lordships will see how impossible it would be to have any effective sale of this railway without a determination of what the thing was that was to be sold.

LORD WATSON: What you are disposing of.

Mr. BLAKE: It would be an absolute speculation, if left undetermined, to what extent there was this charge or not: and I do not think anybody will dispute the proposition that for any practical efficacious grant of relief to the Plaintiffs it is necessary to determine the question.

LORD HOBHOUSE : In any sale the real substance of what you are selling is the receipts. The land is of very little value if the revenues are to go to somebody else.

LORD DAVEY : Do your opponents contend that after the sale, supposing it can be made, the revenue in the hands of the purchaser would be applicable to the working expenses of the other parts of the line?

Mr. BLAKE : I understand so.

Mr. ROBINSON : Our view is that that question has never arisen, and is not here for decision.

Mr. BLAKE : My learned friends will not say what they contend.

LORD SHAND : Does your original claim disclose exactly what you contend?

Mr. ROBINSON : Nor do you claim it as part of your relief.

LORD SHAND : We have never been referred to what the claim is in the case. I should have liked to see what you came into Court to claim.

LORD WATSON : These pleadings are in very general terms.

LORD MORRIS : Did you ask as mortgagees for a sale of the property?

LORD WATSON : The prayer of your Bill is on page 13A, and it is : "That "all the property described in and included under the said Indenture may be sold under "the direction of this Honourable Court, and that the Plaintiffs may have liberty to bid "at such sale."

LORD SHAND : Is there any claim, failing your succeeding in that, that you are to receive a certain income from the railway subject to a certain deduction. Supposing you failed in getting your sale is there any alternative claim of the kind that you have been discussing here that you should have a Receiver, and that he should give you certain things?

Mr. BLAKE : Certainly.

LORD SHAND : What head of claim is that?

Mr. BLAKE : No. 3 on 13B.

LORD WATSON: It may be comprehended in it, but in so far as the prayer is for the appointment of a Receiver it is very distinct. It is, "That a Receiver may "be appointed of the revenue, tolls and profits of the first division of the said railway, "and that the same may be applied in payment of the amount secured by the bonds "hereinbefore referred to."

LORD DAVEY: In their answer I do not see that they raise the question you are suggesting, namely, that after the sale the revenues in the hands of the purchaser should be applicable to the payment of the expenses of the entire railway. All they say is that if the Plaintiffs are entitled to receive any portion of the existing revenues, that then they must bear its proportion of the working expenses. That is all they say in paragraph 11.

Mr. BLAKE: There is the 24th paragraph of the Bill at page 13.

LORD DAVEY: I am looking at the answer.

Mr. BLAKE: The Court has been enquiring of me what we (the Appellants) said.

LORD WATSON: The 11th paragraph of the answer at page 16 raises the question that seems to have been dealt with in the Court below, and which you have been dealing with very sharply:—"In further answer to the said Bill of Complaint, we "say that if the Plaintiffs are entitled to receive any portion of the revenues, tolls, and "profits of the first division of the said railway (which we deny), it is only such portion "thereof as may remain after payment of the working expenses of the whole of the said "railway."

LORD DAVEY: That only applies to the Receiver before sale, and in your paragraph 24 you put their contention by way of a pretence, which was the old form:— "The Defendants pretend that any income derived from the said first division in excess "of the working expenditure thereof ought to be applied in payment and discharge of the "working expenditure of the other portions of the railway, and the Defendants have been "and now are applying large amounts of such excess in payment and discharge of such "working expenditure." That only applies to a going concern.

Mr. BLAKE: I should have thought your Lordships would have adopted a more comprehensive view of that allegation.

LORD DAVEY: I wanted to know what the contention of the parties was. If they do not contend it, it seems idle to go into it.

Mr. BLAKE: I am not in a position to compel the Respondents to disclose their contention further than they are pleased to do in answer to the inquiry made by

the Court, and the statement of my learned friend—he will correct me if I misapprehended it—was that they conceived the question had not yet arisen and does not arise now on this record here. So that it is proposed we shall be turned back if we get a decree for sale without knowing what the subject of the sale is. I maintain that a Bill which asks for interlocutory, and intermediate, and also for permanent relief, and asks for the relief of the Receivership till sale, and for a sale as well, and which declares in that 24th paragraph that "The Defendants pretend that any income derived from the "first division in excess of the working expenditure thereof ought to be applied in pay-"ment and discharge of the working expenditure of the other portions of the railway, "and the Defendants have been and now are applying large amounts of such excess in "payment and discharge of such working expenditure of such other portions, and "have refused and still refuse to pay," is quite large enough to include all statements applicable to the permanent as well as to the temporary relief.

LORD MORRIS: Would not a non-conditional decree for sale satisfy you without any limitation in it?

Mr. BLAKE: At sometime or another, and somehow or other, before there is a sale, it seems to me to be essential to have it determined what the subject matter of the sale is to be.

LORD WATSON: The Court might be very unwilling to give an absolute decree of sale, except a sale of the property conveyed to the mortgagees by the mortgage, and that might be the question.

LORD MORRIS: The property conveyed to you is the first section of the railway, and you want to sell without any limitation on that.

Mr. BLAKE: Yes.

LORD WATSON: Now it is made subject to any burden or lien by the terms of the mortgage, and therefore this lien will pass with the property to the purchaser.

LORD MORRIS: The mortgage will be free from all incumbrances.

Mr. BLAKE: I quite agree if sold free from all incumbrances.

LORD MORRIS: I do not understand what you want more than a decree for sale, and a Receiver in the meantime, and if they want to put limitations on it, it is for them to put them on.

LORD WATSON: If you sell the property conveyed by the mortgage, that means the property with any burdens which the mortgage imposes on it.

Mr. BLAKE: It is a sale of the mortgaged article, and if the mortgaged article is an article subject to a prior lien, then it is a sale of that thing subject to a lien.

LORD HOBHOUSE: I suppose if you were to sell without any declaration of your rights under the mortgage, the purchaser would only buy a law suit.

Mr BLAKE: Yes. In fact he would not buy at all, and nobody would give anything for it. I earnestly trust that whatever is the fortune of this appeal, it will not be decided that at this time of day, and under these conditions, the question is not raised, because it does seem to me to be unquestionably raised. Supposing your Lordships to grant a decree at some time or another, the subject matter which is to be sold must be ascertained, and ascertained before it can be usefully or reasonably put up, and the parties are here, and the question has, as your Lordships will observe, been fully discussed as to the condition of things in any alternative.

LORD HOBHOUSE: It seems so. This is a leading case as to the rights of the parties. It is a mortgage of a section.

Mr. BLAKE: Yes.

LORD HOBHOUSE: This is of the first impression.

LORD DAVEY: In this case a portion of the line is in another Province.

Mr. BLAKE: I have to deal with all that.

LORD HOBHOUSE: It affects the right to sell.

LORD SHAND: That is the real difficulty.

Mr. BLAKE: From what I have heard from the Bench I should have supposed there were several difficulties. I do not know, and I must not judge, what the difficulties of the case are.

LORD HOBHOUSE: You will endeavour to overcome them one by one.

Mr. BLAKE: I shall approach that subject with cheerfulness presently. If I may say what I have to say about the condition of things after sale, I only reiterate the observations that came from the Bench yesterday, that where you have a sale of the section which is contemplated by the mortgage legalised in this record, unquestionably and in accordance with the conditions of the 14th, 15th and 16th Sections of the General Act, which provide for its being made efficacious by the franchise being given to the purchaser to work the section, it is entirely irreconcilable with that condition of

things, that it should be intended that after sale there should exist this intimate perpetual indissoluble relation between the cut-off part that is to be sold to A, and the fruits from which are thus: A's fruits under the clause and not the Company's fruits, but fruits to be received by A under the franchise to be subsequently given to him by Parliament, should be subject to this burden of the deficiency—for I suppose that is to be the amount of it—of the working expenses of another railway in small part constructed, and in large part not yet constructed.

LORD WATSON: I do not know that one can derive much inference from that. According to the system of law prevailing in that part of the world, the purchaser of the line could not get at the line without going to Parliament, or getting certain specified leave to administer the railway, and it would be within the power of Parliament to impose such terms for the convenience of the public on the purchaser as they might think fit.

Mr. BLAKE: Doubtless.

LORD WATSON: The public interest is safe when it reaches Parliament.

Mr. BLAKE: That is what I stated at the beginning of my argument, if the Legislature thought fit to impose this condition.

LORD HOBHOUSE: All these matters are in the discretion of the Minister.

Mr. BLAKE: Yes, and all the observations I have been about to submit to your Lordships are in favour of the view, that it was not intended to arrange that by this mortgage. If the Legislature should decide from motives of public policy that the only terms on which they will give the franchise necessary to operate the railway is, that it shall be saddled with the deficiency of working expenses on the other line; that is another matter.

LORD WATSON: The purchaser would be able to go to the Legislature and say, I am now the owner of this section; I desire to be incorporated subject to such conditions as the Legislature may think fit to enact.

Mr. BLAKE: Yes, and then if the Legislature thought it right and prudent they might say these are the only conditions.

LORD HOBHOUSE: You do not want to go to the Legislature weighted with a decree against you to the effect that you are to be burdened?

Mr. BLAKE: Under such conditions our fate would be sealed, because with a solemn decree of the Court that we should be onerated the Legislature would say why should we release you? The question of public policy is left to the Legislature. Then the third Article enters into the terms of sale, and it is material to me on the remaining

branch of the case also, and therefore I trouble your Lordships with a perusal of it with regard to this and the remaining branch of the case. It is at page 73: "In case "default shall be made in the payment of interest on the said bonds or any of them as "aforesaid and shall continue as aforesaid for the period of twelve months thereafter, or "in case default shall be made in the payment of the principal of the said bonds or any "of them or any part thereof, it shall be lawful for the Trustees after such entry as afore-"said, or after other entry, or without entry personally, or by their attorneys or agents, "to sell and dispose of the said first division or portion of the said railway and telegraph "and of all and singular the property, rights and franchises hereinbefore expressed to be "conveyed, and which shall be then subject to the lien of these presents either separately" —your Lordships see the sale was to be either separately—"or in conjunction with the "owner or owners for the time being of the remaining portions of the said line at public "auction in the City of Winnipeg, in the Province of Manitoba, or elsewhere in North "America or Europe, and at such time as the Trustees shall appoint having first given "notice of the time and place of such sale by advertisement published"—in a certain way—"and after such notice it shall be lawful for the Trustees to make such sale or to "adjourn such sale from time to time in their discretion and if so adjourning "to make the same without further notice of the time and place to which the same "shall be so adjourned, and if the premises shall not be sold by public sale as aforesaid to "sell the same by private contract with power for the Trustees to make any such sale as "aforesaid, subject to such conditions as the Trustees think fit, and to vary any contract "for sale, and to buy in at any public sale, and to fix any reserve price, and to rescind "any contract for sale, and to re-sell without being answerable for any loss occasioned "thereby, and to make and deliver to the purchaser or purchasers of the said railway and "premises or any part thereof, good and sufficient deed or deeds in the law for the same in fee "simple, which sale, made as aforesaid, shall be a perpetual bar, both in law and equity "against the Company and its assigns, and all other persons claiming the said premises "or any part or parcel thereof, by, from, through, or under the Company or its assigns, "and the title of the purchaser shall not be impeachable upon the ground that no case "has arisen to authorise the sale, or that the power was otherwise improperly or irregularly "exercised and after deducting from the proceeds of such sale just allowance "for all expenses thereof, including Attorneys' and Counsels' fees and all other "expenses, advances, or liabilities which may have been made or incurred by the Trustees "in operating or maintaining the said railway and premises or in managing the business "thereof, and all payments by them made for taxes or assessments and for charges and "liens prior to the lien of these presents on the said premises or any part thereof, as well "as a reasonable compensation for their own services in addition to the amount of £100 "per annum for each Trustee hereinafter mentioned, it shall be lawful for the Trustees "and it shall be their duty to apply the residue of the moneys arising from such sale to "the payment of the principal and accrued and unpaid interest on all the said bonds "which shall then be outstanding."

LORD DAVEY: I do not quite understand. Why could not the Court in this suit, which is in effect a suit to administer the trusts of the mortgage deed, give liberty to the Plaintiffs to sell?

Mr. BLAKE: We have asked for it, and I hope your Lordships will grant that leave.

LORD DAVEY: That would not interfere with any jurisdiction. They merely give leave to the Trustees to execute their trust.

Mr. BLAKE: I think so. I am going to put this case when I come to the question of jurisdiction on the dual ground of execution of trust and the ordinary mortgagee's right.

LORD DAVEY: That is not a sale by the Court. It is merely exercising supervision over Trustees exercising their own powers of sale.

Mr. BLAKE: That is precisely one of the branches I argue on the question of jurisdiction, and it was to raise that question that I read, your Lordships, the whole of this article through, though a portion of it would have answered the immediate purpose of concluding the question of relief. Then it says:—"and if any of the premises "herein comprised shall, after the power of sale hereinafter contained shall have arisen "remain unsold, it shall be lawful for the Trustees to hold the premises and exercise all "the powers and authorities in the preceding article contained, or to let the premises for "such term and in such manner as shall in their or his discretion seem fit, and they shall "reserve the net monies, rents and profits to arise thereby to be applied to the payment "of the said bonds upon a sale of the said railway and premises." There are the conditions of sale, and there you get once again the provision for discharging out of the purchase money all payments made for taxes or assessments, or for charges and liens prior to the lien of these presents. That is to be discharged once for all out of the purchase money, and it represents the Vendor's lien for unpaid purchase money and things of that kind.

LORD DAVEY: Prior incumbrances, if any.

Mr. BLAKE: "Prior incumbrances, if any," but not incumbrances made by the presents themselves—prior incumbrances to the lien of the presents. Then where the power is to sell the railway in that way—to sell this division and hand it over to the purchaser in that way—I say once again that is an indication to be taken in connection with the granting portion of the instrument, that this was not to be a sale of the railway subject to the working expenses at all. In fact you have no reference to working expenses. You had a reference to working expenses at a time when there was a question of working the railway before there was a complete, permanent, absolute severance, and before the Company had ceased to have any interest whatever, as I submit it will have ceased to have any interest in the section after the sale. But in the clause which deals with that condition of things after a sale you find no reference to working expenses, because then the purchaser would have got it, and the purchaser worked and was obliged to pay his working expenses to receive his fruits, and if any condition with regard to the payment of working expenses, even of the division, out of the revenues was to be made, it was to be made by the Legislature when incorporating the purchaser and giving him his franchise to work, and is not made by this instrument.

Then, my Lords, as I said yesterday, the mortgage is the governing consideration, because the mortgage which I have now discussed in these aspects is a legalised

mortgage by each of the two Statutes to which I have referred, and there only remains that third issue I have placed before your Lordships, whether the Manitoba Court has jurisdiction to order a sale in either of the two aspects as I submit under this Bill, notwithstanding that 9½ miles are beyond the boundary, and whether if it has no such jurisdiction it can order a sale of the 170½ miles.

Then there are two views which may be taken of the methods in which the Court may act, and of the character of its action, and they are both put forward. There is the proposition which Lord Davey has just stated, and which I intended to bring forward, firstly, namely, the proposition that these Trustees, like any other Trustees, are entitled to seek the assistance of the Court in the execution of their trust.

LORD HOBHOUSE: Was that point raised below?

Mr. BLAKE: I think so. One of the learned Judges thinks it is not in the Bill. I say it is dealt with in the Bill, and dealt with by the original decree. The allegations of the Bill are ample to cover it, and the decree itself was based on that view as I think I shall show satisfactorily. The other view is the view of the ordinary mortgage decree. In order to import a jurisdiction to execute the trusts to the extent of ordering a sale at which the Plaintiffs should be at liberty to bid—which is one of the things they want—it would be necessary to find that the conditions preliminary to the Trustees selling had arisen, and that was a 12 months' default. That condition did in fact exist. Less than a 12 months' default would not have been sufficient for this; but any default would entitle the mortgagee to the ordinary mortgage decree. And my view and contention is that there is jurisdiction on whichever of these two equities one acts. Now the Bill at page 7 states the necessary preliminaries. It sets out the bond and proceeds to state:—"For the purpose of securing the said bonds "the said Company executed an Indenture bearing date the 16th day of April, 1886, by "which the Defendant Company granted and conveyed to your Petitioners the said one "hundred and eighty (180) miles and other properties."

LORD HOBHOUSE: It is a longish Bill.

Mr. BLAKE: Very long. Then if your Lordships would look at page 9 you will find by the 12th paragraph of the Bill that the article I have just now read to your Lordships is set out in full, and at paragraph 15.

LORD DAVEY: I suppose it might be said in that view of the administration of the trust that you have not got your *cestuis que trustent* here—the bondholders.

Mr. BLAKE: We conceive that that objection of want of parties would not prevail if it were taken, and that the Trustees do under the general orders of the Court represent the *cestuis qui trustent*. I will show your Lordships the general order if any question is made on that point. You find, as I say, at paragraph 15, page 10, a full statement of the arrangement. You find also in paragraph 18 of the Bill, page 12, the

statement of the 12 months' default, which was a statement only relevant in case it was proposed to go on under the trust as well as under the ordinary mortgage decree. Then you find at page 13, paragraph 21, of the Bill this allegation :—"The Defendants "deny the validity of the said bonds, and pretend that the said indenture was *ultra vires* "of the Defendants, and they deny the right of the Plaintiffs to sell the said first division "of the said railway, and the said Defendants will not, unless compelled by this honour- "able Court, give possession to any purchaser of the said first division. Owing to the "antagonistic position of the Defendants, and for the reasons elsewhere in this Bill set "forth, the Plaintiffs show that a sale of the said first division couldnot be so effectually "made otherwise than under the direction of the Court." Then you find at paragraph 2 of the prayer, page 13a :—"That all the property described in and included under the "said indenture may be sold under the direction of this honourable Court, and that the "Plaintiffs may have liberty to bid at such sale." Then there is the prayer for general relief.

LORD DAVEY: That does not look like a sale by Trustees out of Court.

LORD MORRIS: What better rights have they because they were Trustees to apply to the Court that this mortgage should be dealt with than an individual?

Mr. BLAKE: They would have a perfectly good right to apply to the Court if they wanted to as individuals, but I think they would have a good right to apply to the Court as Trustees for assistance in the execution of their trust.

LORD MORRIS: There was no difficulty about their trust except to sell. The occasion had arisen and there was a default, and they were wanting to sell like any other individual. The mere fact that they were Trustees for bondholders I do not see would assist them.

LORD HOBHOUSE: Is it not difficult to mix up two things in one suit?

LORD DAVEY: If the draughtsman had seen some of the difficulties that have arisen he would have made it a suit by some of the bondholders against the Trustees of the Railway Company and ask that the Trustees should execute their trust on behalf of the Plaintiffs under the direction of the Court. Then it would have been all right. That would be merely the Court saying that the case has arisen under the deed for the Trustees exercising their power of sale and we leave them to exercise their power of sale out of Court, merely telling them that they ought to do so.

Mr. BLAKE: If the decree was "we leave them to do it," without ordering them to do it——

LORD DAVEY: There would not be excess of jurisdiction in doing that.

Mr. BLAKE: I am not very clear that such a decree would be made precisely

in that form, "We leave them to do it." If you tell them to do it, that is in effect ordering them to do it. If you order them to do it at the instance of bondholders, I do not see that the case is bettered by procuring a bondholder to file a Bill asking the Court to order them to do it.

LORD DAVEY: It would meet an objection taken in the judgment as to the frame of the suit, that it does not ask for administration of the trusts.

LORD HOBHOUSE: It seems to raise such different questions.

LORD DAVEY: It is a mere mortgagee's suit.

LORD HOBHOUSE: If you mix up with a suit for administration of a trust a suit to recover something for the estate, such different questions arise. In a suit for the administration of the trust the question would be, Is this for the benefit of the bondholders. In the other there is only a question between the trust estate on one side and the debtor on the other.

LORD DAVEY: That would have made it a very common form of suit. In England there are, perhaps, two or three debenture holders' suits in a day.

Mr. BLAKE: I quite agree in your Lordship's view, and I strongly maintain that this must include both, or it is one or the other. If it is not both, I am rather indifferent which it is. The common form of decree in a bondholder's suit is as my Lord Davey has said, and it is extended to cases out of the jurisdiction, but this is either both, or one of the two. The Court below seemed to have thought it to be the administration of the trust, and I refer in that view apart from the judgments which I do not read yet to the 7th paragraph of the original decree at page 36:—"And this "Court doth further order that in the event of a sale, the same shall be put up at public "auction in the City of Winnipeg, and that notice of such sale shall be given" by certain advertisements. That is all complying with these conditions of sale prescribed in the case of a sale by Trustees themselves.

LORD DAVEY: Does the decree give leave to the Trustees to bid?

Mr. BLAKE: It reserves leave to apply.

LORD DAVEY: In paragraph 11 it says:—"that leave be reserved to the "Plaintiffs, or those beneficially interested under the said mortgage in the Bill of "Complaint mentioned to apply for leave to those so interested, or any of them to bid at "any sale under this decree." That does not look like a sale by the Trustees.

Mr. BLAKE: As I have said I am indifferent. I have really not been able to see that we were disentitled on the question of jurisdiction—which I am only on the threshold of—because this was a mere mortgage suit. If it is to be so treated, and I

conceive that the Court below have rather treated it more as a trust suit than a mortgage suit, that would be the view your Lordships would probably take of it, having regard to the specific allegations I have referred to and the methods in the particular paragraph of the decree of carrying it out which were mentioned. But whatever it is, or whether it is both, it is necessary to recall the fact that the railway was originally a Provincial Manitoba railway of which the head office was originally and has always continued to be in Manitoba; that this Company is domiciled in Manitoba; that almost the whole of this first division is in Manitoba as well; that at the date of the mortgage there were but 130 miles of the railway built, so that that upon which the security was an existing security was all in Manitoba, and of course no question could possibly have arisen except for the circumstance that subsequently some more line was constructed which ran a little beyond the Provincial boundary.

LORD MORRIS: What you sought to sell is a certain number of miles comprised in the mortgage outside Manitoba.

Mr. BLAKE: 94 miles out of 180 miles.

LORD DAVEY: Why do not you sell without the decree of the Court. Why cannot you do that?

Mr. BLAKE: I am disposed to believe that the discussion of the last half-day and this morning furnishes an answer to your Lordship's question.

LORD SHAND: I think you will probably find yourselves again before this Committee.

Mr. BLAKE: No doubt we shall be here again. If we are dismissed now we shall certainly have to come again. The question really is whether your Lordships would order us to sell—to use the vulgar phrase—"a pig in a poke," or whether we can find out what we are selling before we put it in the market.

LORD HOBHOUSE: The first question the purchaser would ask is, what are you selling me, and you would not be able to answer it.

Mr. BLAKE: I am afraid I have not any more light to throw on that subject.

LORD WATSON: I should think the question as to what you are selling is very much in the interest of the mortgagors as well as the mortgagee to determine, because the uncertainty as to the nature and extent of the rights connected with the subject sold affect the mortgagor as well as the mortgagee.

LORD DAVEY: That you might get determined, but having got that determined, then you can sell.

Mr. BLAKE: I daresay. I appreciate that there are difficulties in getting it determined and then there are suggested difficulties in my getting a sale. It seems to me the policy of the other side is one of blocking and obstruction.

LORD MORRIS: If it was decided on your view that it was only the working expenses of this section which, while the Receiver was in office, were to be deducted, and it was decided that the working expenses ceased on sale, then what difficulty would you have in selling?

Mr. BLAKE: I dare say no difficulty in selling as Trustees, but I deny that this circumstance would divest the jurisdiction of the Court to give us ordinary mortgagee's rights.

LORD DAVEY: No doubt of that.

LORD MORRIS: I want to know why you are a bit better or worse because you are Trustees?

LORD DAVEY: You get rid of the jurisdiction of the Court to enforce the mortgage by a judicial sale.

Mr. BLAKE: Unquestionably we should; and I suppose if this case had been perfectly clear on this question of the working expenses, your Lordships would have said to us, Why did not you, having the power of sale, use it? But that question might be asked—I do not know how it is here—in almost every case in which a mortgagee files a bill for sale in the country from which these proceedings come because the mortgages invariably contain a power of sale; but now we are to be turned round because there is a power of sale.

LORD DAVEY: If the Court has jurisdiction you have the right to ask for a judicial sale, but you get rid of the question of jurisdiction. That is what I meant.

Mr. BLAKE: Yes, but having the right to ask for a sale one way or the other, and being compelled to find out what the subject matter of the sale is, when we come to the Court and ask for as much relief as the Court will give us, they can give us a declaration.

LORD WATSON: You did not ask a declaration to that effect. You did not make an assertion in your Bill that such is the case.

Mr. BLAKE: Yes, I have read the paragraph which I conceive does that.

LORD WATSON: Which paragraph is that?

Mr BLAKE: The pretence of the Defendants, which we combat, of course.

LORD DAVEY: I do not see that.

LORD WATSON: You ask in general terms for a sale of the subject conveyed by the mortgage.

Mr. BLAKE: The case practically put is that the circumstance that 9½ miles out of the 180 now built are beyond the boundary, ousts the jurisdiction of the Manitoba Court.

LORD WATSON: It is quite obvious that the first question suggested that necessarily arises on the threshold is this, that you are asking by the second prayer of your Bill a decree *in rem* against heritable real estate situated outwith the jurisdiction of the Court. You are not asking a personal decree but a decree *in rem*.

Mr. BLAKE: Of course, if your Lordships are prepared to adjudicate that the decree asked for, and which we hope will be given, is a decree *in rem*, it is useless for me to endeavour to develop the argument.

LORD WATSON: No person can help seeing there is an important question raised. I can understand there are instances, and some pretty strong ones, of a Court granting a decree against a person with reference to an estate—*Penn v. Baltimore and Others*, notably—but it is a very different thing to enforce a contract because Courts of Equity have means of enforcing them against a person by laying him by the heels in prison till he does what is ordered, but when a decree proceeds not against a person for the purpose of enforcing a contract, but *in rem*, it is different.

Mr. BLAKE: As I have said, if your Lordships adjudicate at this stage of the argument that this is a decree *in rem*, I have no more to say. Your Lordships have concluded the case against me.

LORD WATSON: Who is the person against whom that order is made?

Mr. BLAKE: The Company.

LORD DAVEY: You do not ask that the Company may do anything.

LORD WATSON: If it had been a decree ordering them to sell, it would be a different matter. It is a direction that the estate shall be sold. In what way?

Mr. BLAKE: As I have said. If that is your Lordships' judgment, of course I have no more to say.

LORD WATSON: For example, there may be a decree ordering a ship to be sold by the Admiralty Court.

LORD MORRIS : These are only some of the difficulties before you.

LORD DAVEY : We want to hear your argument.

Mr. BLAKE : The reference made by his Lordship, Lord Davey, to debenture holders and so forth leads me to allude to the forms given in Palmer's Company Precedents as showing the modern, and as I understand the accepted, doctrine of interference by Courts of Equity. I am referring to the 6th edition, form 546 : "Trusts of "deed to be carried into execution. Appoint R, Receiver of property in Manilla. "Liberty to expend not exceeding £400 in preserving property. Order that if necessary "a proper instrument be executed by W, the liquidator of Company, to said R for the "above purposes, to be settled by Judge, pass accounts, &c. Order the property of "Company at Manilla. and all other the real and personal property of Company respectively comprised in the first and second debentures, to be sold with approval of Judge. "W to have conduct of such sale, with liberty to the Plaintiffs and all other debenture "holders and other parties to the action to bid at said sale. Order that the money to "arise from the sale be paid to said W, and that he do, within fourteen days after receipt "thereof, pay same (the amount and date of receipt to be verified by affidavit) into "Court to credit of action, 'Proceeds of sale of mortgaged property'. Tax costs of "Plaintiffs and Defendants as between party and party, and as between Solicitor and "Client, and tax the costs of said liquidator of and incidental to said sale to the completion thereof. Account of what due to first debenture holders and same as to second "debenture holders. Adjourn further consideration. Liberty to apply."

LORD DAVEY : That is in a debenture holders' suit.

Mr. BLAKE : Yes :—"Smith, Ward & Co., (on behalf of themselves and all "other the first mortgage debenture holders of Eastern Sugar Company, Limited), "plaintiffs and the Company, and M. & Co. (on behalf of themselves and all other "second mortgage debenture holders of the said Company) defendants."

LORD DAVEY : The property was vested in Trustees.

Mr. BLAKE : I suppose possibly so. I have not been able to get more information than the form gives in this case.

LORD HOBHOUSE : The property was in Manilla.

Mr. BLAKE : Yes, and persons on behalf of themselves and all the other first debenture holders filed a Bill against the Company and all the other second debenture holders.

LORD DAVEY : And against the Trustees.

Mr. BLAKE : No, my Lord, I have read the whole "Smith, Ward and Co.

"(on behalf of themselves and all other the first mortgage debenture holders of Eastern "Sugar Company, Limited), plaintiffs and the Company, and M. & Co. (on behalf of "themselves and all other second mortgage debenture holders of said Company) "defendants." That is the statement in the book.

LORD HOBHOUSE: You say that without the words "on behalf of" the Trustees do represent?

Mr. BLAKE: Yes. Smith, Ward and Co. were themselves debenture holders and were entitled to sue under the system of representation because the numbers were great. All the debenture holders might have sued and would have been bound to if the number had not been great, and then you would have had the debenture holders themselves suing, and so forth. Here under the General Orders of the Court, which apply as I said awhile ago, the provision is that: "An executor, administrator or Trustee may obtain," &c., &c. [Reading down to the words] "or the execution of the trusts." There is no necessity for having all. Then Order 39: "In all suits concerning real or personal estate," &c., &c. [Reading down to the words] "represent the persons beneficially interested."

LORD DAVEY: There is no doubt of that, but you have the bondholders and their Trustees on the same side of the record. They are Plaintiffs together asking for the enforcement of a mortgage just as if it was a mortgage by an individual.

Mr. BLAKE: Certainly. Your Lordship suggested that the *cestuis que trusts* were not here.

LORD DAVEY: No, that was not the point, but that it was not a suit for the administration of the trusts.

LORD SHAND: You desire to have it declared that you are in a position to have this property sold, and the other party meets you by saying you are not entitled to any such right, even as a declaratory right. First, you ask to have it declared that you are entitled to sell; and, secondly, to go in and sell it. That seems to me not to be a suit *in rem*, but a suit directed against the Company to do or tolerate something to be done in regard to the property.

Mr. BLAKE: I am glad to hear your Lordship say so.

LORD SHAND: That is what occurs to me.

LORD DAVEY: That would get over the difficulty, but what you are asking for is a judicial sale.

Mr. BLAKE: And I find here a judicial sale, ordered at the suit of the first mortgage debenture holders of this Company against the Company.

LORD DAVEY: That is not an authority. One does not know the circumstances of that case, and one does not know whether it was unopposed or what the circumstances were. It may have been *per incuriam*. Mr. Palmer's book is a very good book, but it is not an authority.

LORD SHAND: This is a view that might have been discussed before the Court. The Court have not done more than say it was incompetent.

LORD DAVEY: Yes, they have.

Mr. BLAKE: Because the 9½ miles is outside.

LORD SHAND: But I am speaking of the form of the process.

Mr. BLAKE: No.

LORD DAVEY: The process would be all right if within the jurisdiction of the Court.

Mr. BLAKE: The Court have granted us in the suit a decree for the sale of those portions of the security they thought they were competent to deal with, notwithstanding the objection for want of jurisdiction.

LORD DAVEY: You say they have done that under conditions as to the deduction of expenses that you were not bound to submit to?

Mr. BLAKE: Yes; but I am now dealing with the other aspect of the case. The Court could have granted a sale of the whole if not for the question of the want of jurisdiction. They have granted a sale of the personalty, but because of the 9½ miles being outside the Province they say "No" to the rest. Then form 544 at page 880, and form 545 at page 881 of Palmer are also other precedents, and at page 882 there are two other precedents of the same kind. So that there is a collection of about five precedents which seem to indicate that it is the common principles as against Companies within the jurisdiction to direct a sale of property which is situate without the jurisdiction of the Court in favour of debenture holders.

Then, my Lord, that the question is confined to trust, is entirely an indefensible view, and I refer to the statement which I adopt as part of my argument contained in Dicey's "Conflict of Laws," page 217. "The principle on which this exception, derived "from the practice of the Court of Chancery rests, is that though the Court has no "jurisdiction to determine rights over foreign land, yet, when from a person's presence "in England the Court has jurisdiction over him, the Court will compel him to dispose "of, or otherwise deal with, his interest in foreign land so as to give effect to obligations "which he has incurred with regard to the land." That covers the ground. "The

"obligations which the Court will thus enforce are not easily brought under any one "definite head. Westlake describes them as obligations relating to immovables which "arise from, or as from, a person's own contract or tort. Foote states that 'the English "Courts, acting *in personam* and not *in rem*, will make decrees, upon the ground of a "contract or other equity subsisting between the parties, respecting property situated out "of the jurisdiction,' *i.e.*, out of England]". Then he refers to the case of *Lord Portarlington v. Soulby*, and the Judgment of Lord Brougham in which he quotes :—" This "anomalous jurisdiction, it has been judicially laid down, 'is grounded, like all other "jurisdiction of the Court [of Chancery], not upon any pretension to the exercise of "judicial and administrative rights abroad, but on the circumstances of the person of the "party on whom this Order is made being within the power of the Court. If the Court "can command him to bring home goods from abroad, or to assign chattel interests, or to con"vey real property locally situate abroad ; if, for instance, as in Penn v. Lord Baltimore, "it can decree the performance of an agreement touching the boundary of a Province in "North America, or as in the case of Toller v. Carteret, can foreclose a mortgage in the "Isle of Sark . . . in precisely the like manner it can restrain the party being "within the limits of its jurisdiction from doing anything abroad, whether the thing "forbidden be a conveyance or other act *in pais*, or the instituting or prosecuting of an "action in a foreign Court.'"

LORD DAVEY : I think that is stated rather broadly.

Mr. BLAKE : Of course that is not Mr. Dicey's statement. That is a quotation from a judgment of Lord Brougham in 3rd Mylne and Keen. Then Dicey proceeds to cite a very much more recent judgment I shall probably have to trouble your Lordships with a little more at length, and that is in the case of Ewing v. Orr-Ewing 9th Appeal Cases, page 40 :—" The Courts of Equity in England are, and always have been, Courts "of Conscience, operating *in personam* and not *in rem* ; and in the exercise of this "personal jurisdiction they have always been accustomed to compel the performance of "contracts and trusts as to subjects which were not either locally or *ratione domicilii* "within their jurisdiction. This indefinite jurisdiction is exceptional, and is (substantially) "confined to cases in which there is either a contract between the parties, or something of "the nature of a trust. The Court, further, will not make a decree which runs contrary "to the law of the country, where the land affected is situate. If, indeed, the law of the "country where the land is situate should not permit, or not enable the defendant to do "what the Court might otherwise think it right to decree, it would be useless and unjust "to direct him to do the act, but when there is no such impediment, the Courts of this "country, in the exercise of their jurisdiction over contracts made here, or in "administering equities between parties residing here, act upon their own rules, and are "not influenced by any consideration of what the effect of such contracts might be in the "country where the lands are situate, or of the manner in which the Courts of such "countries might deal with such equities." That is from ex parte Pollard in Montagu and Chitty at page 250.

LORD WATSON : A Trustee appointed by a Scotch Court resident in England is liable to an administration suit at the instance of a legatee with a view of ascertaining the amount of his interest.

Mr. BLAKE: Yes. One of the cases that establishes that proposition is *Ewing v. Orr-Ewing*, in which your Lordship concurred in the judgment delivered by Lord Selborne, a portion of which I just read from Dicey, and I wish to read a little additional to that:—"They have done so as to land, in Scotland, in Ireland, in the "Colonies, in foreign countries: 'Penn v. Baltimore.'"

LORD WATSON: Done what?

Mr. BLAKE: This is what, as already quoted, his Lordship says they have done:—"The Courts of Equity in England are, and always have been, courts of "conscience, operating *in personam* and not *in rem*; and in the exercise of this personal "jurisdiction they have always been accustomed to compel the performance of contracts "and trusts as to subjects which were not either locally or *ratione domicilii* within their "jurisdiction."

LORD DAVEY: I suppose if there was an Englishman who had the legal right to land in the United States of America in trust for me, I could have that enforced by an English Court. I suppose there is no doubt of that?

Mr. BLAKE: It is not limited to trusts at all.

LORD DAVEY: It is not limited to trusts.

Mr. BLAKE: No. Your Lordship said that this is what that statement meant. I say it extends to contractual relations far beyond trusts.

LORD DAVEY: No doubt.

Mr. BLAKE: And I say that this is a contractual relation.

LORD DAVEY: And if you asked the Railway Company to complete the contract, or implement their contract, that would be different.

Mr. BLAKE: One of the things we consider to be necessary is a further assurance in the words of the deed, and another thing is that they should join in the conveyance on the sale which is to be made under the Order of the Court. Ewing goes on: "A jurisdiction against Trustees, which is not excluded *ratione legis rei sitæ* "as to land, cannot be excluded as to moveables, because the author of the trust may "have had a foreign domicile; and for this purpose it makes no difference whether the "trust is constituted *inter vivos*, or by a will, or *mortis causâ* deed. Accordingly it has "always been the practice of the English Court of Chancery (as was said by James "L. J., in *Stirling—Maxwell v. Cartwright* (1) to administer, as against executors and "Trustees personally subject to its jurisdiction, the whole personal estate of testators or "intestates who have died domiciled abroad, by decrees like that now in question."

LORD HOBHOUSE: Is that all a quotation from Orr-Ewing's case.

Mr. BLAKE: Yes.

LORD WATSON: I think on the other hand, throughout all these cases it has been assumed that the Court, beyond the territory within the limit of which the land is situate, can pronounce no adjudication with reference to the title.

Mr. BLAKE: With reference to the question of title there are some considerations which are special and peculiar, as I submit, with reference to the constitution of our country, and the position of the North-West Territories.

LORD WATSON: There is one very obvious consideration, that unless it is adopted by the Court of that country and accepted it is all *brutum fulmen*. How is an English Court to affect land in the United States or Canada with any determination between A and B.

Mr. BLAKE: Supposing a sale were ordered by the Court, and the sale took place at Winnipeg under the decree.

LORD WATSON: It is not a decree which a foreign Court is bound to receive with comity and treat with comity.

Mr. BLAKE: Supposing that under the decree for sale the Railway Company were ordered to join in the conveyance, and the Railway Company did join in the conveyance (being forced by that exercise of influence on the conscience to which your Lordship has referred, which I believe is operated on by sequestration instead of imprisonment in Company cases to execute the conveyance), and it was in fact executed. I presume the title would pass.

LORD WATSON: If you can get at a man's conscience by curtailing his personal liberty that is a different matter.

Mr. BLAKE: It is certain that a Corporation is considered a person for this purpose, and that the jurisdiction the Court would exercise, *in personam*, if it was an individual, might be, exercised against a Company on the theory of personal jurisdiction.

LORD HOBHOUSE: Here you have the curious circumstance that the Legislature which is supreme over both Courts, has made the same declaration as to the property in the two Provinces.

Mr. BLAKE: Yes, I think I had better go at once to that point and refer later to the authorities, which I conceive deal with the case specifically because there is certainly a distinction. This is a case in which it is quite contrary to the facts, and the law to talk of a foreign country and foreign law. You have a peculiar constitution

with a peculiar distribution of legislative rights and powers. and dealing for the moment with this case in a more unfavourable light than is the true light——

LORD WATSON: Does the relation of the respective judiciaries of the Canadian Provinces differ in any respect from the relation subsisting between the Supreme Courts of England, Scotland, and Ireland?

Mr. BLAKE: The Supreme Court of Scotland, England and Ireland is one Court.

LORD WATSON: They are independent judiciaries within their own jurisdiction.

Mr. BLAKE: They have a Common Court of Appeal.

LORD WATSON: The same may be said in the instance I put to you. The House of Lords is a Common Appeal Court. The effect of an Appeal Court being a Supreme one makes no difference under the Act. The Appeal Court if it does sit sits as a Court of Appeal from the country from which the Appeal comes. We sit for the whole Provinces of Canada, but we are sitting here now for Manitoba.

Mr. BLAKE: Is it quite clear that that is correct unless your Lordships are prepared to overrule *Cooper v. Cooper* in the House of Lords?

LORD MACNAGHTEN: *Cooper v. Cooper* was a Scotch decision. The House of Lords did not get rid of its knowledge of Irish law.

LORD DAVEY: They felt bound to say the case must be decided according to Scotch law.

LORD SHAND: But they did not require evidence of Irish law. That is all.

Mr. BLAKE: But if they had been a Scotch Court they would have, and his Lordship has stated that this Court is sitting as a Manitoba Court in this case.

LORD DAVEY: We must come to the same decision as in our opinion the Manitoba Court ought to have given.

LORD WATSON: They would not apply English law without being informed of it by evidence. The English Court when applying Scotch law proceeds either on evidence given by learned Counsel, or they have power to send a case to the Court of Session for information; but when no evidence has been taken which ought to have been taken when a case comes to the House of Lords, they do not, sitting as a Scotch Court, require evidence of English law.

Mr. BLAKE: The Court as I understand it has decided that. Supposing no evidence has been taken, we understand the principles on which the Court deals with foreign laws. It does not know them. Supposing evidence has been taken, it deals with the laws upon the evidence, and upon the construction of the evidence. The same case comes from Scotland to the House of Lords, and then if no evidence has been taken, the House of Lords say, we know and we do not require evidence.

LORD MACNAGHTEN: The evidence may have been taken, and the House of Lords does not agree with it. They may reject it.

Mr. BLAKE: I was taking the two propositions.

LORD DAVEY: Supposing, following out that analogy, if it were necessary in this case, or any other case from Manitoba, to decide any question according to Quebec law, we should not require to be informed of the Quebec law. We should probably take cognisance of it. We should know probably judicially the Quebec law.

Mr. BLAKE: Probably so.

LORD DAVEY: Or we should say we did.

LORD MORRIS: In the same way as the House of Lords say they know Scotch law.

Mr. BLAKE: Your Lordships would also do this as Lord Macnaghten has said. Supposing the evidence had been taken in the Manitoba Court, and the Manitoba Court had decided according to the evidence, your Lordships might say this evidence is all wrong. We know judicially, and we all know that judicial knowledge is exact knowledge. Whereas expert knowledge may be mistaken, judicial knowledge is exact knowledge, at any rate, when in the Court of ultimate jurisdiction with nobody to correct it; and therefore we will discard the expert evidence and not rely on it.

LORD DAVEY: I suppose Her Majesty's advisers advising Her Majesty know the law of the whole of the British Empire?

LORD HOBHOUSE: It is our painful duty to decide upon it.

Mr. BLAKE: The question always is, whether, like Nelson, one may not be obliged to turn a blind eye to it; and it does seem a little anomalous that the lower Courts should have been corrected on the principle of *Cooper v. Cooper*.

LORD DAVEY: We take judicial cognisance.

Mr. BLAKE: I hold in this particular case, and assuming for the moment as I have said that I am dealing with a Province instead of a territory—and I make a

distinction on that subject—in this particular case there was judicial knowledge of everything that was material in order to the determination of the case. What is the case? Under the Canadian constitution the Parliament of Canada has power to create the Railway Company with particular powers.

LORD WATSON: I do not doubt that the Dominion Parliament can give jurisdiction to any Court anywhere in Canada, or to arbitrators, to determine this point as between the parties, but it has not done so.

Mr. BLAKE: I am not arguing that it has.

LORD WATSON: If you say by implication it has conferred jurisdiction on a particular Tribunal, good and well. If so, that Tribunal has jurisdiction.

Mr. BLAKE: I am not arguing that it has, my Lord.

LORD WATSON: I do not doubt that in dealing with this matter, which is a railway matter apparently over which the two Legislatures have authority, they might, as they have done in certain other cases, have referred it to arbitration and remitted it to a particular arbitrator.

Mr. BLAKE: I quite agree. The Legislature might have constituted a Court for this purpose, and it has not done it. Why it has not done it has to be conjectured.

LORD HOBHOUSE: They never contemplated this difficulty.

Mr. BLAKE: Probably not; but I maintain this that the Parliament of Canada, of whose laws all the Courts in all the Provinces are bound to take judicial notice, has within the unquestionable exercise of its powers created such a relation between these persons and this Company as is known to and is obligatory upon all the Provinces. That law provides for and has legalised a charge with these powers upon a bit of railway which is partly in Manitoba and partly in the North West Territories. It is impossible to say the construction of that contract and of those powers is different in one country and in the other, or can be made different by either country by its exercise of any Provincial or Territorial jurisdiction. You get a construction whatever it may be. You cannot have a different construction of this same Dominion law, created and imposed by the superior common power, in Manitoba and in the North West Territory, nor can you find any power in either Manitoba or the North West Territory to annul, to vary, or to modify, or to interfere in any way with that common law. You, therefore, have no case whatever of difficulty as to there being possibly some local legislation which may interfere with the effect and operation of any decree which may be made by any Court in either of the two jurisdictions. You are not informed of any difficulty, a circumstance which would be enough according to the authorities, because the Courts have acted where it might be *bratum fulmen* if it was not shown to them by the *lex situs* that it would be *bratum fulmen*. They do not assume that there is difficulty

created by the law of the *situs* as a reason why there should be no exercise of their jurisdiction. They assume in the absence of proof that there will be no difficulty. But here I go further, and I say there can be no difficulty. I say if the territorial Assembly of the North-West Territory had passed a law assuming to provide there should be no sale under this mortgage and no conveyance, and that the purchaser should not be let into possession, and that the mortgagee should not have his rights it would be null and void.

LORD MORRIS: What follows, supposing all that?

Mr. BLAKE: It follows that we have here judicial knowledge of the fact in the Court of Manitoba that by a paramount law, which it knows, this mortgage must receive just the same construction and must confer just the same rights—exactly the same rights—and must be construed according to the same view of construction of instruments and with the same results in the North-West Territories as in Manitoba itself. That is so to a still greater extent with reference to the North-West Territories than it would be as to a province, for in the Territories there is no question of provincial rights incapable of being moulded or modified at any instant by an Act of Parliament of Canada.

LORD MORRIS: Supposing it was not possible for the North-West Territory to take a different view from Manitoba as regards the rights, how does that entitle the Judiciary of Manitoba to sell land in the North-West Territory?

Mr. BLAKE: I think so, treating it, as I have said, as a decree in execution of a contractual relation—a personal contract between the parties in respect of which the party to be bound is in Manitoba; and so far from there being proof, or a reasonable suggestion that there is any difference of law in the North-West Territory, it is impossible in the nature of things that there can be any difference at all. If they had said to us, You ought to prove that your rights are the same in the North-West Territory as they would be in Manitoba, and you ought to prove that as a matter of fact before the Court will assume to act by selling, I should have answered, No; it is your business under the authorities to establish such an unfortunate difference for us as makes an obstruction. But, as I say, I go altogether beyond that here; for I say it is judicially proved and present to the mind of the Court in Manitoba, as of the Court here, that not merely is there no difference, but there could be no difference created.

LORD WATSON: Assume that it is one instrument that ought to be read in every Court in the same way; but it does not at all follow that it would.

Mr. BLAKE: No; but your Lordships are going to determine the true construction, and I have pointed out the construction must be the same wherever the document speaks at all, and therefore it will be the same in the North West Territory as your Lordships adjudicated it to be in Manitoba.

LORD HOBHOUSE: The difficulty is that opinions differ as to construction.

LORD DAVEY. That does not carry you far, because in the analogous case of England and Scotland, for instance, the rights may be regulated under identical Acts of Parliament, but still the English Courts would not have jurisdiction to deal with Scotch land, and *vice versa*.

Mr. BLAKE: No jurisdiction *in rem*.

LORD DAVEY: Though the rights were under an identical Act.

Mr. BLAKE: I am not trying to answer one of the difficulties thrown out, as I was opening my argument, namely, the diffiulty of *brutum fulmen*.

LORD WATSON: I do not know how you define a judgment *in rem*. A common instance is a judgment in the Admiralty Court directing the sale of a ship.

LORD HOBHOUSE: If you had a declaration as to the true meaning of the mortgage, and that was made by a Court superior to both the North West Territory and Manitoba, you could sell on your own authority. You would have no difficulty with the purchaser then if it was in your favour.

Mr. BLAKE: We should have no difficulty with the purchaser in that position of affairs; and if so, we would know what sort of security we had at any rate.

LORD HOBHOUSE: If you get your rights declared, and that is favourable to you, you will have no difficulty in the market.

Mr. BLAKE: No doubt; and, therefore, a favourable declaration of our rights would relieve us from a great part of our embarassment.

LORD HOBHOUSE: That is one of the reliefs you are entitled to. It seems to be so.

Mr. BLAKE: Yes that is one of the reliefs to which, I submit, we are entitled; and no doubt it would be a beneficial thing; but with reference to the nature of this property, we should like, if we could, to have a decree for sale under the direction of the Court; and it is for that I am contending at present.

Then one of the most recent cases, which lays down the line of distinction is the case of *The British South African Company v. The Companhia de Moçambique and Others* reported in 1893 Appeal Cases at page 602. That was a case of trespass to land. The first judgment was delivered by Lord Herschell, then Lord Chancellor at page 617. The question as stated by him is: "Whether the Supreme Court of Judicature has "jurisdiction to try an action to recover damages for a trespass to lands situate in a "foreign country"; and then there is considerable argument upon the question of local

venue and transitory actions. Then at page 626: "Whilst Courts of Equity have "never claimed to act directly upon land situate abroad, they have purported to act upon "the conscience of persons living here. In *Lord Cranstown v. Johnston*, Sir R. P. Arden, "Master of the Rolls, said: *Archer v. Preston*, *Lord Arglasse v. Muschamp*, and *Lord "Kildare v. Eustace*, clearly show that with regard to any contract made, or equity "between persons in this country, respecting lands in a foreign country; particularly in "the British Dominions, this Court will hold the same jurisdiction as if they were situate "in England.' Story, in his Conflict of Laws, ss. 544, 545, although he says that to "the extent of the decision in *Cranstown v. Johnston* there may, perhaps, not be any "well-founded objection, nevertheless expresses the view that the doctrine of the "English Courts of Chancery on this head of jurisdiction seems carried to an extent "which may perhaps in some cases not find a perfect warrant in the general principles "of international public law, and therefore it must have a very uncertain basis as to its "recognition in foreign countries so far as it may be supposed to be founded upon the "comity of nations. My Lords, the decisions of the Courts of Equity do not, to my "mind, afford any substantial support to the view that the ground upon which the Courts "of Common Law abstained from exercising jurisdiction in relation to trespasses to real "property abroad was only the technical difficulty of venue." That is the way his Lordship states the case of the jurisdiction of Courts of Equity with a view to distinguish it from such a jurisdiction as would allow them to interpose in a case of actual trespass to real property abroad. Then at page 631 Lord Halsbury states: "There is a concurrence "of opinion of most jurists, if not all, as to the difference between what we call realty "and personalty, by whatever words those things are distinguished in the jurisprudence "of foreign countries, which affects very materially the right to try. Vattel distinguishes "the questions which may properly be tried where Defendant has his settled place of "abode, but always subject to this, that if the matter relates to an estate in land or to a "right annexed to such an estate, in such a case, inasmuch as property of the kind is to "be held according to the laws of the country where it is situated, and as the right of "granting it is vested in the ruler of the country, controversies relating to such property "can only be decided in the State in which it depends."

LORD WATSON: If this Company had undertaken in the event of their default to sell that section of the line, and hand over the proceeds to the mortgagees, I do not see why the Courts of Manitoba could not have issued a judicial order on the Railway Company to make that sale. It is a contract with regard to land.

LORD DAVEY: Or if the Plaintiffs were bond holders, and the trustees were Defendants, and the Railway Company were Defendants, I do not at the present moment see any difficulty in the bond holders obtaining a decree as against the Trustees directing them to execute their trusts by selling this section, and directing the Railway Company to do all acts necessary to enable the Trustees to effect that sale.

LORD WATSON: If the Court were to order this sale, as you ask them to do, the result would be that the purchaser would derive his title from the decree of a foreign Court.

LORD DAVEY: You are not asking for a sale under the deed, but asking

for a judicial sale by way of enforcing the mortgage. You are not asking that you may be at liberty to sell, and that the Railway Company may do every act necessary to enable you to do so ; but you are asking a judicial sale in its ordinary jurisdiction of enforcing the mortgage.

LORD WATSON : It is possible this objection would disappear if the form of order was a declaration that in the circumstances of this case the mortgagees were entitled to sell the whole section on certain terms. That would have been a declaration of the rights of the parties under the contract, and not a declaration which in itself directly affected the land.

LORD MORRIS.—You have a general prayer for relief, and you have the covenants in the mortgage deed for further assurance to do all that is necessary.

Mr. BLAKE : Yes. I should have ventured to hope that the technical difficulties could be got over by that prayer for general relief. All material facts are stated on the Record, and the case has been fought on this ground throughout.

LORD MACNAGHTEN : At present your difficulty does seem to be more technical than real until we have heard the other side.

Mr. BLAKE : I ask, of course, that any amendment of the pleadings may be made, the parties being before the Court, and the issues being substantially stated, and the prayer for general relief existing to prevent the great misfortune of this case that has come here to be tried being turned round in this way, and coming again.

LORD SHAND : Supposing this was a case where there was one mile of the railway outside, would that principle come in ?

Mr. BLAKE : It is the same thing.

LORD SHAND : Is the decision of that previous case to be carried the length of saying that would not be a proper section even though that mile was excluded, and that it is disintegrating the railway.

Mr. BLAKE. That is another branch, and I am intending to ask that in the alternative.

LORD WATSON : I do not see how you can possibly introduce that question in this case, and I will tell you why : In this Appeal you ask for what the Court would have power to deal with if specifically asked to grant a warrant for the sale of the road so far as within Manitoba ; but you contented yourself apparently at the trial with leading evidence of the fact that there were 9½ miles outside Manitoba. The other party then tendered proof to the effect that when you take off the 9½ miles there was not left a proper section that ought to be sold. It is only the first Judge who says so,

and at page 43 he says this :—"A more important objection to a decree for sale was "raised by evidence, showing that Langenburg, the terminal point of the mortgaged "division, and the last nine and-a-half miles of that division, are situated in the North-"West Territories, and not within the territorial jurisdiction of this Court. This "evidence was given without objection, but when evidence was being offered on the part "of the defence of circumstances which might lead the court to decline a decree for sale of "the portion situated in Manitoba by itself, the Plaintiffs' Counsel objected that no such "point was raised by the pleadings, and I refused to allow it to be given."

LORD SHAND: That is an objection on the ground of the plea. It is not that the thing would not be fit on its merits.

LORD WATSON: That is an objection to the objection that there is no proof on the point, which is the point admitted to be by the party who ought to have made the statement in his pleadings.

LORD SHAND: There is no proof because they did not make the averment.

LORD WATSON: I did not for a while see how on that point we could give any decision in this case. For all we know to the contrary, this artificial division of the section cutting it in two may be the most convenient for a total line.

LORD SHAND: The Defendant has not averred that, or pleaded it; therefore it is out of the case.

Mr. BLAKE: I think the suggestion which was made to which the learned Judge referred was not the suggestion with reference to the 170½ miles, but about the section which would be left, 9½ miles.

LORD WATSON: I think the section must have two respectable termini before it answers that description.

Mr. BLAKE: But if 170 miles were sold, the 9½ miles which were left might not be a proper section to be sold separately, and if so the evil consequences of that result would fall on my clients.

LORD WATSON: To my mind, the most serious objection to the point is this: that the only section the Legislature have authorised you to sell is that particular section between these two points, including the whole 180 miles. You have no power to sell any other portion.

LORD SHAND: Or any part thereof.

LORD HOBHOUSE: The judgment of Mr. Justice Killam, whether he received evidence or not, seems to proceed on the footing that some of the railway was without the jurisdiction. He knew the fact.

Mr. BLAKE: That was slipped in without objection, and it stood there; and it is a notorious fact.——

LORD SHAND: It did not require to slip in if it was notorious.

Mr. BLAKE: I did not mean notorious in that sense. I ought not to have used that term.

LORD HOBHOUSE: You could not deny it when face to face with the judge.

Mr. BLAKE: No. It would have been a mere question of a day and a few pounds. It would have been ridiculous to talk of it. The suggestion proposed to be made to Mr. Justice Killam was not that the 170½ miles would not be a proper section; but if that were sold the 9½ miles would be an improper section to sell.

LORD SHAND: Do not these matters act and react on each other?

Mr. BLAKE: No, because the principal difficulty is disintegration, and if we cannot sell the 9½ miles, because by itself it is improper to sell, we have lost our power to sell the 9½ miles by selling the 170½. We never can sell it because it is an improper section; but that does not interfere with the sale of the 170½ miles on which I venture to recall your Lordships' attention to the fact I gave to your Lordships, which is to my mind conclusive of the proposition that it must be a proper section, namely that this 170½ miles was not merely a section, but was the whole original railway. This Company was incorporated to build this 170½ miles of line, and no more. It was empowered to build from Portage-la-Prairie to the western boundary of the Province of Manitoba.

LORD SHAND: Had it been in that condition for years before the 9½ miles were made?

Mr. BLAKE: I cannot say.

LORD WATSON: Can you tell me whether at the end of this Manitoba portion next to the North Western Teritory there is a terminus?

Mr. BLAKE: No, my Lord. There is a station, I suppose, but I do not know. There may be some little hamlet, but no terminus because the road is one.

LORD WATSON: Is there a terminal station?

Mr. BLAKE: My Lord, there is not traffic for a terminal station. This road is built along the Prairie, and there may be a barn or two at Langenburg.

LORD MORRIS: There is a definite boundary. It is not the boundary of the portion you are selling, but the boundary of the Country.

Mr. BLAKE: Yes, and it was the whole railway that they were authorised to build originally.

LORD MACNAGHTEN: Originally it was the Manitoba Act, and they could not authorise anything outside.

Mr. BLAKE: The Company were authorised, and went on and constructed part; and then what happened? When the Dominion intervened what did it do? It authorised this Company "to extend their line" into new territory; and that circumstance does not the less leave a presumption that that which was the whole original railway is of itself a fit section to be sold.

LORD MACNAGHTEN: That was the railway originally projected. It was never a completed railway at the point stopping there.

Mr. BLAKE: No; it was authorised to be built. The whole railway itself was authorised to be constructed in sections.

LORD HOBHOUSE: In 1886 you took it that the whole 180 miles was one integer and one section of the railway or division of the railway.

Mr. BLAKE: I cannot deny that.

LORD HOBHOUSE: Can you say now that a division is to be struck at some different point.

Mr. BLAKE: It seems to me we can suggest the sale of different portions, always provided we do not sin against *Redfield v. Wickham* as to disintegrating the road.

LORD WATSON: It is clear that the policy of the railway Acts is this: That when part of the railway is sold it shall be such a portion of the railway as that a purchaser can reasonably apply to the Legislature for incorporating powers, and subsequently to work for the benefit of the public. That is what is meant all through.

Mr. BLAKE: It will now be my duty to refer your Lordships to the Judgments.

LORD WATSON: Certainly there is nothing in *Redfield v. Wickham*, and this Board did not lay down anything different to that.

LORD HOBHOUSE: The mortgage must govern you in this matter, what-

ever stage you are in. I should doubt whether under a mortgage of a property like this, taken as a whole, you could sell piecemeal at all.

LORD DAVEY: I should think you have declared your mortgage to be of a section.

LORD MORRIS: You do not want a sale piecemeal. You want to sell the whole.

Mr. BLAKE: Yes; but if your Lordships say we cannot sell the whole, then we want to sell that piece only, whatever consequences might follow as to the 9½ miles.

LORD SHAND: What would be the consequences. It would not revest in the Railway Company.

Mr. BLAKE: No, my Lord.

LORD SHAND: It would be hung up.

Mr. BLAKE: There would be a question as to the saleability of the 9½ miles; and if we did assume to sell, unless the Legislature determined that the 9½ miles was a fit subject to be granted to a purchaser, the sale would be abortive.

LORD DAVEY: There would be this: If the proceeds of your 170 miles produced sufficient to pay off your mortgage, then the Railway Company might recover these 9½ miles free from your encumbrance. If the proceeds were not sufficient the 9½ miles would still remain subject to the balance unpaid.

Mr. BLAKE: Which does no harm.

LORD DAVEY: Then you might commence an action in the North Western Territorial Court to have your 9½ miles sold.

Mr. BLAKE: The Court would have first to determine that it was a proper integer, and if the Court did determine that, the purchaser would still get nothing unless the Legislature thought it was proper too.

LORD SHAND: Supposing you got possession of and sold all but the 9½ miles, it must be a proper integer. It is the only thing left.

Mr. BLAKE: Not the only thing left of the whole railway.

LORD SHAND: Are there many miles beyond that?

Mr. BLAKE: There are 40 or 50 miles built, and 200 more expected to be built if your Lordships decide against us. If your Lordships made a fund out of this section to pay the expenses of building the other, it will go on and be built.

LORD HOBHOUSE: Out of your pockets, as you say.

Mr. BLAKE: Yes.

LORD WATSON: The Legislature have made provision for the case of repurchase of a part of a railway that is capable of being operated by the purchaser.

Mr. BLAKE: Now, my Lords, I will go to the judgments. At page 42 there is the judgment of the Judge of First Instance.

LORD SHAND: He was dealing with the case by himself?

Mr. BLAKE: Yes, he did not sit in the higher court. "The plaintiffs sue as "mortgagees in trust for bondholders, of the defendants' railway and appurtenances, "and of its tolls and revenues, for a sale of the property, and in the meantime for a "Receiver. The Bill shows that the Company was incorporated by Act of the "Legislature of Manitoba: that subsequently by Act of the Parliament of Canada, the "Company's railway was declared to be a work for the general advantage of Canada, "and an extension thereof into the North-West Territories was authorised: that the "Company's head office is at Portage-la-Prairie in Manitoba"——

LORD SHAND: That is only narrative?

Mr. BLAKE: Yes, that is narrative. Then he says: "By the answer several "objections for want of parties were taken, but the only one pressed at the hearing was "the non-joinder of the bondholders." Then the learned Judge decides that the mortgagees could sue by themselves without joining the *cestuis que trustent*. "Whether the "suit be for sale or foreclosure it is brought in the interests of the *cestuis que trustent* "and to realise upon the property for their benefit"—and so on. Then, "The Trustees "have, under the mortgage deed, a full power of sale with authority to receive the pur-"chase money. And even if they had not, the Court could effectually control the appli-"cation of the proceeds of the property. I feel myself precluded by the decision of the "Full Court, upon the Plaintiffs' application for leave to sue, from considering the "objections to mortgagees of such property under an instrument such as that in question, "being granted a decree for sale of the property. The opinion indicated by the Court "was that the Plaintiffs had a right to this relief, and although the decision created no "estoppel upon the point, I feel it to be binding upon a single Judge, even if I did not, "as I do, notwithstanding the further argument, concur in that opinion. It is argued "now that the jurisdiction to decree a sale, under the Act 15 and 16, c. 86, sec. 48 (Imp. "1852), and our General Order, No. 417, is given only where there is jurisdiction to "decree foreclosure, and that as it has already been decided that the Court cannot decree "foreclosure of a mortgage of a statutory railway"—(a proposition I should dispute as good law in Canada if it were material in this case)—"it has no power to direct a sale. "But the Court has abstained from granting foreclosure of a mortgage of such property "only on grounds of public policy. It was merely the nature of the property that pre-"vented it from decreeing foreclosure or sale, and the Legislature having now provided "the means for transferring the possession of and power to operate the railway, it would

"seem upon the principles laid down in *Redfield* v. *The Corporation of Wickham*, 13 A.C., "467, that the alternative jurisdiction to decree sale may be invoked by the Plaintiffs. "Even before the Act 15 and 16 Vic. c. 86, the Court would grant a decree for sale "in certain special cases in which foreclosure would be an inadequate remedy, which "shows that the jurisdiction was in the Court in a proper case. The fact that fore- "closure can not be granted would seem a ground for exercising such jurisdiction."

LORD DAVEY: In what Court has it been decided about the Manitoba Railway. Has it been decided by the Supreme Court?

Mr. BLAKE: I am not able to say.

LORD DAVEY: It is a Canadian Court.

Mr. BLAKE: Yes.

LORD DAVEY: You would dispute that if it were material?

Mr. BLAKE: Yes, having regard to the altered policy indicated by the three Sections I have referred to, there would still always remain the right of Legislature to refuse the franchise, and the party would have to apply for it. "In *Hutton* v. *Sealey*, "4 Jurist, N.S. 450, where objection was made that the mortgagee was confined to his "remedy under a power of sale in his mortgage deed, Sir John Stuart, V.C., con- "sidered the circumstances that the proceeds of a sale under the power were to be "held in trust as a ground for the trustees asking that the sale be made under the "directions of the Court." That is one of the cases I intended to read something from to your Lordships, and which I think important on these mere technical questions.

LORD DAVEY: I suppose that was before the Court of Chancery had power to direct a sale?

Mr. BLAKE: I daresay. "A more important objection to a decree for sale "was raised by evidence, showing that Langenburg, the terminal point of the mort- "gaged division, and the last 9½ miles of that division, are situated in the North-West "Territories, and not within the territorial jurisdiction of this Court. This evidence "was given without objection,"—and so on. "Upon the argument, however, it was "contended by the plaintiffs' counsel that the objection to the jurisdiction of the Court "was not open, neither it nor the facts on which it was based being raised by the "pleadings, and that at any rate a decree could be made for sale of the portion of the "railway within the Province. Upon the latter point I agree entirely with the argu- "ment for the defence. Before the enactment of the provisions now found in the "Railway Act, 51 Vic., c. 29, ss. 278—280 (D 1888), there were no means by which "the purchaser of a statutory railway, upon a sale under a mortgage, could "obtain power to operate it and exercise the franchises of the Company. But in "consequence of the similar clauses in the previous Act, 46 Vic., c. 24 (D 1879), the "Judicial Committee of the Privy Council held, in *Redfield* v. *The Corporation of*

"*Wickham*, 13 App. C. 167 'that a railway or section of a railway may, "'as an integer, be taken in execution and sold like other immeubles, in ordinary "'course of law. But the judgment contains the qualification that these enactments "'do not suggest that, according to the policy of Canadian law, a statutory railway "'undertaking can be disintegrated by piecemeal sales at the instance of judgment "'creditors or incumbrancers.' The word 'sections' then cannot be taken as meaning "any piece cut off from a railway. The Court, upon the principles prevailing before "these enactments, cannot decree a sale of a portion of the railway unless that portion "be a section which the purchaser can obtain power to operate under the Statute. The "Company under the authority of an Act of Parliament has mortgaged a certain "portion or division of the railway. That at least seems to be thus set apart, under "Parliamentary authority, as a section which could properly be dealt with separately. "But to divide this again by cutting off 9½ miles to be dealt with by the Courts of the "North-West Territories, and perhaps transferred to a different purchaser, would seem "to come within the mischief suggested by the Judicial Committee."

LORD SHAND: That raises the question whether one mile would do, and if the matter comes to be so small in proportion to the line, I am not sure that the decision of the case would go that length.

Mr. BLAKE: Quite so. "At any rate, it appears to me that, to obtain a "decree for sale of a portion only of the division mortgaged, the Plaintiffs should have "shown that it was a section proper to be cut off from the balance of the railway and "operated separately." I have given your Lordships what I think is good evidence on that subject from the fact that it was the whole original line, and the rest is only an extension of it, and what was originally intended to be built and operated exclusively it is difficult to conceive cannot be operated separately. "In my opinion also the "Defendant Company is not precluded from raising, without pleading it, the objection "that a portion of the mortgaged property is beyond the territorial jurisdiction of the "Court." I think, perhaps, I need not trouble your Lordships with that part of the judgment.

LORD HOBHOUSE: You have submitted all the argument.

Mr. BLAKE: I think on the whole, looking at the whole case, I am indisposed, whatever my learned friends are disposed to do, to interpose a purely technical objection which your Lordships would certainly, in this state of the case, choose to have corrected in some way before deciding adversely to us. I ask the same measure, which I think ought to be granted, and if, after the decisions of the Court, your Lordships would permit the evidence to be admitted and the true facts got out before deciding adversely on this point, I prefer to leave it there.

LORD SHAND: On what point?

Mr. BLAKE: On the question of the 9½ miles being out of the jurisdiction.

LORD SHAND: That I understand there is no dispute about.

Mr. BLAKE: It cannot be disputed.

LORD SHAND: Therefore there is no dispute.

Mr. BLAKE: The statement of the fact is not in the pleadings that it was beyond the jurisdiction.

LORD SHAND: You cannot dispute that this Board must treat the case on the footing that there are the 9½ miles outside.

Mr. BLAKE: Yes; but I am referring here to the question raised below as to there being a proper plea to the jurisdiction. It seemed to me that in the way this case has reached this tribunal, it would not agree to dispose of that question of jurisdiction on the technical question of pleading, but would amend it, inasmuch as the facts are undisputed, and dispose of the case according to the truth. In the opening I did not raise any point, because I thought that was the spirit in which the tribunal would deal with the case, and I think that is the spirit in which the tribunals should deal with all the questions on both sides.

LORD DAVEY: If it is not a mere dilatory plea in abatement it does not want pleading. The moment it is proved to the satisfaction of the Court, the Court is bound to stay its hand.

LORD SHAND: He says, "In my opinion also the Defendant Company is "not precluded from raising without pleading it the objection," and a great part of his opinion is taken up with that point.

Mr. BLAKE: This is the part I did not propose to read, but I might perhaps have read it in the time I have taken to state it. Then at page 45: "The Court of "Chancery in England has from a very early date entertained suits of various kinds "relating to real property situate in other countries, and there can be no doubt of the "jurisdiction of the Court to do so in many cases. Mr. Westlake, in his work on "Private International Law, 163, expressed the opinion that in some cases in England "no ground existed for interference, but the personal jurisdiction of the Court over the "parties; but he and other leading writers upon the subject are now agreed that such a "doctrine must be received with qualification. See Westlake, paras. 162-6; Story's "'Conflict of Laws,' paras. 424, 543, 551; Wharton's 'Conflict of Laws,' paras. 288, 289. "Mr. Westlake says, in para. 162, 'A proprietor of foreign immovables, or person "'interested in such, may be compelled by the English Court, if it has personal juris-"'diction over him, to dispose of his property or interest therein, so as to give effect to "'any obligation relating to them, which arises from, or as from, his own contract or "'tort.'"

LORD DAVEY: Speaking personally for myself, I doubt whether Mr. Westlake does not go too far in including mere tort.

Mr. BLAKE: I think there are some kinds of torts to which Mr. Westlake's observations would not apply, but it is not material. This is not a question of tort, and you may read it "to dispose of his property or interest therein so as to give effect "to any obligation relating to them which arises from, or as from his own contract." For the purpose of our case that is quite enough. We contend that this is an obligation arising from contract—"and that obligation will not be measured by the *lex situs* of the "foreign immovables to which it relates, but in accordance with the rules of private "international law.' And, further, in para. 163, 'But where the relief which might "affect the foreign immovables is not sought on any ground falling under the last "paragraph the English Court will decline to make its mere personal jurisdiction over "the Defendant a ground for determining the right either to the property or the "possession of foreign immovables, but may perhaps assume to determine such right "on the ground of moveable property being mixed up in the same proceedings.' In "paragraph 164 he deals with mortgage suits, and while he shows that suits both for "foreclosure and for redemption have been entertained, he seems to doubt whether the "Court of Chancery has not gone somewhat too far in respect of them." Then he cites *Massie v. Watts*, 6 Cranch, page 148, in which Chief Justice Marshall said: "Was this case, therefore, to be considered as involving a naked question of title, was "it, for example, a contest between Watts and Powell, the jurisdiction of the Circuit Court of "Kentucky would not be sustained. But where the question changes its character, "where the Defendant in the original action is liable to the Plaintiff either in conse-"quence of contract or as Trustee, or as the holder of a legal title acquired by any "species of *mala fides* practiced on the Plaintiff"——that must be a sort of tort.

LORD DAVEY: An implicit tort.

Mr. BLAKE: Yes, in consequence of a breach of duty, "the principles of "equity give a Court jurisdiction, wherever the person may be found, and the circum-"stance that a question of title may be involved in the inquiry, and may even "constitute the essential point on which the case depends, does not seem sufficient to "arrest the jurisdiction"—(there your Lordship sees contract, tort)—"Then (after "referring to several cases) 'Upon the authority of these cases, and of others which "'are to be found in the books, as upon general principles, this Court is of opinion "'that, in a case of fraud, or trust, or contract, the jurisdiction of a Court of Chancery "'is sustainable wherever the person may be found, although lands not within the "'jurisdiction of the Court, may be affected by the decree.' These principles are "practically the same as those laid down by the Chief Justice of our own Supreme "Court in the late case of *Henderson v. The Bank of Hamilton.*" That was a case where the right was created by the local law which made a Judgment a charge on lands; and it was endeavoured to be enforced in a case in which the judgment debtor was out of the jurisdiction as well.

LORD DAVEY: Was that Chief Justice Strong?

Mr. BLAKE: Yes. He delivered a Judgment, but I am not quite certain whether it was the Chief Justice who delivered the Judgment.

Mr. ROBINSON: I think so.

Mr. BLAKE: "When law and equity were administered by separate Courts, "Courts of Equity held that where personal equities existed between parties over whom "they had jurisdiction, though such equities might have reference to lands situate without the jurisdiction they would give relief by a decree operating not directly upon the "lands, but strictly *in personam* . . . . But in all such cases there was some "personal obligation in the nature of a trust or other equity which the Court enforced as "it was said by affecting the conscience of the party against whom it decreed relief. "This indirect mode of affecting lands over which the Court could not properly have "any direct judicial authority was, however, confined to the class of cases mentioned, "and was never extended so far as to give direct relief in respect of charges on lands" —now, mark this, my Lords, "by decreeing a sale in the nature of "an equitable execution," — an equitable execution of a Judgment or an equitable interest—"or the raising of a bare charge such as the Statute has "conferred on the Appellant in the present case." A local foreign statute conferring a charge—that was the nature of the case. "Such decrees would have been unenforce-"able in the foreign jurisdiction, and might have brought the Courts decreeing them "into collision with the forum within whose local jurisdiction the lands were situated. " . . . . The tendency of modern decisions has been to decline jurisdiction with "reference to foreign land, and when we consider that if the arguments evoked for the "Appellants were to prevail, we might be asked to uphold a judgment of a Quebec "Court in a hypothecary action respecting lands in Ontario, or *vice versâ*, a judgment in "an action in the Ontario Courts directing a sale of hypothecated immovables in the "Province of Quebec, the convenience, good sense, and sound jurisprudence of the "rules laid down in the later English authorities, which have now culminated in the "House of Lords in the case of *The British South African Company* v. *The Companhia* "*de Moçambique* became at once apparent." It is the case of *The British South African Company* v. *The Companhia de Moçambique* he rests upon. I have read the statement briefly of what was decided in that case, and it seems entirely outside the line of the case before your Lordships.

LORD HOBHOUSE: It seems to be a powerful statement of the general principles.

Mr. BLAKE: Here is the learned Judge's further statement of what *Henderson v. The Bank of Hamilton* was. "The plaintiff, claiming under a Certificate of Judgment "registered under our Statutes, sued in Ontario to redeem a mortgage of lands in "Manitoba. It was held that he could not have such relief, as he had only a statutory "claim, by a local law, to have the lands sold for satisfaction of his Judgment, which "could not be carried out without the aid of the Courts of this Province, especially as "the judgment debtor was without both jurisdictions, and 'the title of a purchaser "'could not be perfected without a conveyance from him, or a vesting order, which the "'Manitoba Courts alone would have jurisdiction to grant and enforce.'"

LORD DAVEY: The right construction of the local statute would be that it only affected the lands within the jurisdiction of the Legislature that passed the statute.

Mr. BLAKE: Yes, and this land was within the jurisdiction of the Legislature that passed the statute.

LORD WATSON: He sued in Ontario.

LORD HOBHOUSE: I suppose the Plaintiff there had a judgment against the mortgagor, and on that ground sued to redeem something beyond the jurisdiction.

Mr. BLAKE: His right to which depended only on the local law, and it happened that the purchaser himself was without the local jurisdiction, and the decree could be enforced only by a conveyance or vesting order, and the local court alone could make the vesting order.

LORD WATSON: The registration of the order of the Court of Ontario in Manitoba had the effect of converting it into an order affecting land within Manitoba.

LORD HOBHOUSE: It was not a case of a contract, but of an adverse judgment.

Mr. BLAKE: Yes.

LORD WATSON: A judgment which had become a judgment in Manitoba by registration.

Mr. BLAKE: I will read one extract from the Judgment of Chief Justice Strong as to the facts. At page 722 of the report of the case in the Supreme Court he says: "That a judgment, if one were pronounced, for the sale of the lands could "not be fully carried out without the aid of the Courts of the *situs* is apparent, if we "bear in mind that the judgment debtor is without both jurisdictions, and that the title "of a purchaser could not be perfected without either a conveyance from him or a vesting "order which the Manitoba Courts alone would have jurisdiction to grant and enforce." Then the learned Chief Justice adopts the Judgment of Mr. Justice Osler, delivered in the Court below in 20th Ontario Appeal Reports, at page 650, from which I desire to read an extract.

LORD WATSON: You are still dealing with Henderson's case.

Mr BLAKE: Yes; Chief Justice Strong refers to these observations which I am about to read to your Lordships—"From these cases and many others which might "be cited, it will be seen that the jurisdiction of the Court in such cases as the one "before us is founded on the existence of some contractual obligation, express or "implied, or some trust or equity between the parties which the Court acting *in* "*personam* and upon the conscience of the party affected by it will enforce in that "manner. Now as between the plaintiff and Lillico there is as regards the charges "upon the land neither privity of contract nor any equitable obligation or trust. It is "a statutory charge created *in invitum* upon lands in the foreign state by the registra- "tion of the foreign judgment, and the rights resulting from it must be enforced by the "Courts of that State. And although the statute declares that the estate of Lillico is "bound 'the same as though charged in writing by him under his hand and seal' this

" cannot have the effect of creating a contract, or establishing a privity of obligation " between them and his judgment creditor. It is no more than a declaration of the " effect of the registration, and gives the plaintiff no *locus standi* in the Courts of this " Province to enforce it *in personam* against Lillico in default of payment of the " Judgment. *A fortiori*, therefore, it would seem to give the plaintiff no right to " compel the Defendants, to account to him here in respect of Lillico's mortgage to " them, and to submit to redemption of their security. Outside of the foreign State " there is no one who is affected by the charge, or capable of being sued in respect of " it as regards any personal obligation to pay. It is, as I have said, simply a statutory " charge to be enforced under the law of the State which enforced it and confers no " status upon its holder in the Courts of any other country."

LORD HOBHOUSE: It does not create that obligation on the conscience.

Mr. BLAKE: No, and the person whom they sought to affect was beyond the jurisdiction of the Court, so that there was an end of the whole thing.

LORD DAVEY: There was neither the one nor the other.

Mr. BLAKE: No; you had not the contract and you had not the man.

LORD SHAND: I think the man was of more consequence.

Mr. BLAKE: It may be so. Your Lordships see the line of distinction taken and it is a line of distinction which is analogous to that in the Mocambique case. Those are, the observations of Mr. Justice Osler, approved by the Chief Justice in 20 Ontario Appeal Reports, page 750. He adopts them.

LORD HOBHOUSE: They are in his judgment?

Mr. BLAKE: No; that is the reason I give the reference.

LORD SHAND: There is something in his Judgment expressing his approval?

Mr. BLAKE: Certainly. I have not got that quotation—I trusted to my memory for that. Then the next case that the learned Judge cites is the case of *Norris v. Chambres*. It is a case which shows that there must ordinarily be some privity or relationship between the parties to warrant the interference of the Court in respect of lands abroad.

LORD DAVEY: Although the Defendant was in England the Court refused to enforce a mortgage of foreign lands. Both the Plaintiff and Defendant were in England, and they were Englishmen.

Mr. BLAKE: That case requires to be considered.

LORD SHAND: Have you some notes upon it?

Mr. BLAKE: I have notes consisting only of extracts from the Judgment in 29 Beavan, page 246. At page 250 the Master of the Rolls states the case thus—it was a suit instituted by the legal personal representatives of the notorious John Sadleir, who committed suicide—"for the purpose of establishing a lien on a mine in Prussia "called 'The Maria Anna and Steinbank Colliery' which has been purchased by the "Defendants, Chambres and Slatter, as Trustees for 'The Maria Anna and Steinbank "'Coal and Coke Company,' from the Defendant, Michael Simons. The Bill prays, in "the first place, a decree against Michael Simons, which would be a matter of course if "he were before the Court." There was a contract with Simons, but Simons had not been effectually served, although made a party. As to him, with reference to whom there was a contractual relation, the decree would have been a matter of course. The Bill next prays "an account of what is due to the Plaintiff, as the representative of "John Sadleir, for the moneys advanced by Sadleir in paying part of the price of the "mine, and also for the further sums expended by him in working the mine, of which "it is alleged the Defendants have had or now have the benefit. It then prays that "the Defendants Chambres and Slatter and the Maria Anna Company may be declared "to have bought this mine subject to the interest of the plaintiff in it"—not by contract with him, but subject to his interest—"and that they may be ordered to pay "the amount to be found due to John Sadleir, or his estate, upon taking this account; "or, in the alternative, that the shares in the mine to which John Sadleir would "have been entitled may be ascertained, and the value of them at the rate of fifty "shillings per share, with interest thereon, may be paid to the Plaintiff by the Maria "Anna Company. The Bill lastly prays for the appointment of a Receiver of the "mine." Then at page 253: "It is a suit by the Plaintiff to enforce a personal "demand or to obtain the declaration of a lien on the property of the new Company "and on the purchase made by the two gentlemen who acted as their trustees, and it "is in this light alone that it can be properly regarded and considered. So regarding "it, it is a suit by a Plaintiff, residing in England, against Defendants, also residing "here, to enforce a lien on immoveable property of the Defendants, situate out of the "jurisdiction of this Court. The bare statement of such a proposition requires that "some special state of circumstances should exist in order to enable the Court to give "any relief of this description."

LORD SHAND: Your narrative so far does not say what the Plaintiff is suing on.

LORD DAVEY: A vendor's lien?

Mr. BLAKE: Not a vendor's lien on their own contract.

LORD DAVEY: These people had bought with notice of and expressly subject to the lien.

Mr. BLAKE: They had sold to A and A had sold to B subject to the lien, but there was no contract at all between B and them; therefore it was an endeavour to

enforce an alleged charge on the immovables without any contractaal relations between the parties. "I am referred in support of this demand to the case of *Penn v. Baltimore* "and that class of cases which establishes that when a Plaintiff in England has an "equitable money demand against a Defendant also residing here, this demand will be "enforced by the Courts here, not merely against the Defendant personally, but, if "the circumstances of the contract or dealings between the parties justify it, by the "declaration of a lien against the real property of that Defendant out of the jurisdiction "of the Court, and even in some cases by the appointment of a Receiver. Those cases "have certainly, as Mr. Justice Story observes, gone to the full extent of the assertion "of jurisdiction of this Court, and they are always encumbered with this difficulty— "that the declaration of this decree may be a mere *brutum fulmen*, incapable of being "practically enforced against the Defendant. Still, if the Plaintiff is entitled to it, "this Court must give him the decree, as he asks for it, and then leave him to make it "available or not, as he can, in a foreign country. I am not disposed, however, to go "a step further than those cases warrant and demand. On examining them, I find "that in all of them a privity existed between the Plaintiff and Defendant, they had "entered into some contract or some personal obligation had been incurred "moving directly from the one to the other. In this case I cannot find that anything "of that sort exists. Neither Sadleir nor the Plaintiff had entered into any contract "with the Maria Anna Company, or with the Defendants Chambres and Slatter. To "examine this point more closely, I will treat the case as if John Sadleir were the "Plaintiff, and suing the Defendants, and seeking against them the relief prayed by "this Bill. In doing so I will in the first place consider how the case would stand if "the Maria Anna Company were a perfectly new and distinct company from that in "which John Sadleir was a shareholder, and in the next place I will treat it as if it "were merely a continuation of the old company under a new name. If the former "be supposed, then the case made by him would be this:—John Sadleir agrees with "Michael Simons, a Prussian, resident in Prussia, to buy from him an estate in that "country, and pays him part of the purchase money. Simons having received "this money, repudiates the contract, and sells the estate to a stranger. That "constitutes no personal demand which Sadleir could enforce in this country against "that stranger. There is no contact between them, there are no mutual rights, and "there is no obligation moving directly from one to the other. I am told that according "to late decisions, and according to the law of England, if a man sell an estate to B., "and receive part of the purchase money, and then repudiate the contract and sell the "estate to C., who has notice of the first contract and of the payment of part of the "purchase money by B., B. shall, in that case, have a lien on the estate in the hands "of C. for the money paid to the original owner. But assume this to be so, this is "purely a *lex loci* which attaches to persons resident here and dealing with land in "England. If this be not the law of Prussia, I cannot make it so because two out of "the three parties dealing with the estate are Englishmen, and I have no evidence before "me that this is the Prussian law on this subject, and if it be so, the Prussian Courts of "Justice are the proper tribunals to enforce these rights. If the owner of an estate in "Prussia mortgage that estate to an Englishman, it is new to me that the Courts "of Equity in this country will administer, as between those persons, the law obtaining "in England with relation to mortgages, and foreclose or direct a sale of the Prussian "estate, if payment be not made of the amount due. But even, in so stating the case "as a case of mortgage, I put it too favourably for the Plaintiff, for in that case there

" would be a privity and personal contract between the parties, which here there is " not. The facts of the case either constitute a valid hypothecation on the mine of the " Defendants in Prussia in favour of the Plaintiff, or they do not. If they do, it is in " Prussia, and the Courts of Law in that country that this hypothecation is to be " enforced ; if they do not, I cannot make that a charge on immovable property in " Prussia which the law of Prussia treats as being no charge or hypothecation of the " land itself. In the cases cited, the equity between the parties was complete, the " Plaintiff was entitled to a decree to compel the Defendant personally to pay him a " a sum of money. The declaration of lien and the appointment of a Receiver, which " followed, were only to enforce more completely a decree which the Plaintiff had " obtained for payment against the Defendant, and which might be enforced against " the person or property of the Defendants here. But in this case the very foundation " is wanting"—(not in our case, for all these foundations exist in the case in hand)— " for independently of the lien which the Court is asked to declare, if needed, and " which it is not asked to create, there is no equity between the parties ; here the " Plaintiff is entitled to no decree against the Defendants for payment of any sum of " money."

LORD SHAND : It is a very special case.

Mr. BLAKE : Yes : but it draws a distinct line, and the line is that which divides this case from the Mocambique case and all others. All these observations which go to distinguish are observations which go to include our case. " Here the " Plaintiff is entitled to no decree against the Defendants for payment of any sum " of money, nor is any such claimed, but the equity and relief sought begin " and end with a prayer to make a certain transaction between other persons, one of " whom is a stranger to the Plaintiff, an interest in an estate in Prussia, belonging to " that stranger, and this independently of all personal equities attaching upon him."

LORD WATSON : Do you mean to say that the same considerations arise where there has been no decree ?

Mr. BLAKE : We ask for and are entitled to a decree. We have a contract with the Company to pay, for which payment we are entitled to have a decree.

LORD WATSON : I am quite aware of that, and that gives you a right against the land which you are asking to make good without the medium of any proceeding.

Mr. BLAKE : No : we ask for an order to pay, and it is only in default of that payment that there is to be a sale. They are entitled to prevent a sale by payment. Their obligation is to pay.

LORD SHAND : These observations all draw the line you are mentioning, but it is all done for the purpose of excluding that case.

Mr. BLAKE : Yes : but it is by stating what the case is within which there is a jurisdiction.

Then with reference to the case in Appeal, that is to be found in 3 De Gex Fisher & Jones, page 583.

LORD WATSON: There is no prayer or conclusion for payment.

Mr. BLAKE: The only decree that could be made is the decree that was made which was an order for payment, in default of a sale—the invariable decree. At page 584 the Lord Chancellor says: "With respect to this advance, I think that, "upon the authority of *Penn* v. *Lord Baltimore*, which has often been acted upon, the "Plaintiff would have been entitled to succeed if he could have proved that the claim "for a declaration of the proposed lien or charge on the Maria Anna Mine was founded "on any contract or privity between him or the deceased John Sadleir and the Defen- "dants, the purchasers of the mine, and if there had not been a suit in the Prussian "Courts, in which the same question was raised and has been decided in the Plaintiff's "favour. But I agree in thinking with the Master of the Rolls that the Plaintiff has "failed to show any such contract or privity. Upon the evidence adduced, the pur- "chasers of the mine, whom he sues, are to be considered as mere strangers, and any "notice which they may have had of transactions between John Sadleir and the Anglo- "Prussian Coal and Coke Company (which has now ceased to exist) cannot give this "Court jurisdiction to declare the proposed lien or charge on lands in a foreign country. "An English Court ought not to pronounce a decree, even *in personam*, which can "have no specific operation without the intervention of a foreign Court, and which in "the country where the lands to be charged by it lie would probably be treated as "*brutum fulmen*. I do not think that the Court of Chancery would give effect to a "charge on land in the County of Middlesex so created by a Prussian Court sitting at "Dusseldorf or Cologne." Then in the Judgment below the learned Judge says, "The case of Michael Simons is quite distinct from this as against him; if he was "before the Court the Plaintiff might be entitled to a personal decree. A clear privity "exists between them in respect of the dealings between Simons and Sadleir, and it "might well be that the Court having made a decree against Simons for repayment of "the amount due from him to Sadleir might further declare that a lien, to the extent "of the amount due, attached on the immovable property of Simons in Prussia so far as "that property had been obtained solely by virtue of the dealings with Sadleir." So that the distinction is laid down between two sets of persons who were not before the Court.

LORD DAVEY: This case of Simons would have been exactly *Penn v. Lord Baltimore*, because Simons contracted to buy from Sadleir and had not paid him; therefore Sadleir had a right to sue him on the contract for the purchase money.

Mr. BLAKE: Then the learned Judge goes on to refer to an Ontario case. He says at page 47 of the Record: "In *Burns v. Davidson* 21 Q. R. 547, it was held by "Boyd C. and Ferguson J. that an Ontario Court should not interfere to declare fraudu- "lent as against creditors a conveyance of land in the State of Oregon. After referring "to one class of cases, Chancellor Boyd said: 'All these cases depend on a privity "'existing between the parties arising from contract, or from some personal obligation "'moving directly from the one to the other. They have gone to the very limit of the "'jurisdiction and were always encumbered with this difficulty, that the decree may

" 'be a mere *brutum fulmen*, incapable of being practically enforced against the " 'Defendant's property.' *Massie v. Watts*, 6 Cranch, 148, *Watts v. Waddle*, 6 Pet. " 389, *Boyce v. Grundy*, 9 Pet. 289, and *Watkins v. Holman*, 16 Pet. 25, are decisions of " the Supreme Court of the United States that conveyances by an officer of a Court of " one State under authority of a decree of the Court, of lands situated in another State, " do not operate to pass the title in the State where the land lies, at least without " proceedings in the Court of the latter State. Having thus considered some of the " principles upon which the Court has to act in respect of foreign immovables, I will " examine some of the cases as to mortgages. It has been held, in cases which I deem " of binding authority upon me, that the Court of Chancery in England would decree " foreclosure of a mortgage of lands abroad, where the mortgage was made in England " and the mortgagor resided there. *Toller v. Carteret*, 2 Vern., 494 ; *Paget v. Ede*, L. R. " 18 Eq., 118."

LORD DAVEY : *Paget v. Ede* is to that effect, but there are people who doubt it. It has never been so decided in a Superior Court.

Mr. BLAKE : " In *Beckford v. Kemble*, 1 Sim. and St. 7, Sir John Leach, V.C., " not only made a decree for redemption of a mortgage of lands in Jamaica, but also " granted an injunction to restrain the mortgagee from proceeding with a suit for fore- " closure in the Courts of Jamaica. And upon the argument the Plaintiff's Counsel " stated that there were cases in which the English Court of Chancery, noticing the law " of Jamaica, had, upon foreclosure, decreed a sale of the estate in the West Indies."

LORD WATSON : It is a long time since it has been doubted. If a man sells land in Scotland to an Englishman, and he does not fulfil his bargain, the Scotchman comes here and sues for fulfilment of the contract. The English Court of Chancery would have no hesitation, I take it, in pronouncing an Order upon him to execute a proper disposition according to the law of Scotland. He would go to prison if he was fool enough to remain in the country. An English Court could not put him in possession of the land by its decree.

LORD DAVEY : I rather think there would be some disturbance in Scotland if the English Court of Chancery granted foreclosure of a Scotch mortgage.

LORD WATSON : That is another question.

LORD DAVEY : I should not like to be party to it.

Mr. BLAKE : Would there be equal disturbance if it were for redemption ?

LORD SHAND : It all comes back to that principle, that you must have the person resident and a person bound by contract.

Mr. BLAKE : I have a contract, and I have a person.

LORD SHAND : I do not say the principle could be challenged. I should not anticipate that the learned Counsel on the other side could challenge the principle laid down by the learned Judge, who has given us a very plain and clear judgment.

Mr. BLAKE: The portion of the judgment I was reading when your Lordships interposed was that part which relates to the question of mortgages. A number of cases are cited.

LORD WATSON: All courts have more or less a tendency to manufacture international law to suit their own requirements.

Mr. BLAKE: The Judgment proceeds to deal with the case of mortgages, and to quote a case of *Beckford v. Kemble*. "In *Beckford v. Kemble*, 1 Sim. and St. 7, "Sir John Leach, V.C., not only made a decree for redemption of the mortgage of "lands in Jamaica, but also granted an injunction to restrain the mortgagee from pro- "ceeding with a suit for foreclosure in the Courts of Jamaica. And upon the argu- "ment the Plaintiff's Counsel stated that there were cases in which the English Court "of Chancery noticing the law of Jamaica had upon foreclosure decreed a sale of the "estate in the West Indies. In Mr. Coote's Treatise on 'The Law of Mortgage,' 4th ed. "at page 992 it is stated: 'In Ireland and the Colonies it is the practice, instead of a "'foreclosure, to pray that the estate may be sold and the money applied,' &c. . . "'Where, therefore, the mortgaged estate is situate in Ireland or the Colonies, and a "'suit is instituted in the English Courts by the mortgagee, the proper course is to pray a "'sale.'" A number of authorities are quoted in support of that. Then he refers to *Beckford v. Kemble* and *Willink v. Bentink*, and he says:—"In *Willink v. Bentink* the report shows that "a decree had been made at the instance of a mortgagee of an estate in Demarara for "sale of the estate, and for the appointment in the meantime of a manager of the "estate; and that this decree had only been granted after opposition. I have not "been able to find any report of the argument or Judgment at the time of the making "of the decree. The case came up subsequently on a motion to compel the mortgagee "to take certain steps, or allow them to be taken, for the protection of the estate, and "on a re-hearing of this motion Lord Cottingham, L.C., suggested some doubts as to "the correctness of the decree, but did not distinctly specify what these were. In *ex "parte* Pollard, 1 Jur. 288, 6 L.J., N.S., Bk'y. 95, there was a petition to the "Bankruptcy Court to have it declared that the bankrupts had created an equitable "mortgage upon lands in Scotland by deposits of title deeds, and to have the lands "sold. This was refused, but on appeal the decision was reversed by Lord Cottingham, "L.C. Pending the proceedings on appeal the land had been sold by the assignees, "and the Chancellor merely decreed that the proceeds should be applied in discharge "of the debt, to secure which the deposit was made. (See) 4 Jur., 489; 'Westlake's "Private International Law,' s. 162; Ch. Dig., Vol. I, p. 728, Vol. 3, p. 2619 (2). "In *Strange v. Radford*, 15, Ont. R. 145, Boyd, C., refused a decree for sale of lands "in Manitoba under a mortgage." There is a case in the Supreme Court of Pennsylvania.

LORD DAVEY: It may be this; you say you have a power of sale by the contract; we will help you to execute your power, and we will compel the mortgagor who is within our jurisdiction to do whatever he can to assist you. But you must sell and convey the title not by judicial sale, but by virtue of your own power. That seems to me to be the distinction.

LORD HOBHOUSE: If you could get the contract construed you would be content?

Mr. BLAKE: Of course, if we could get the contract construed rightly we should be able to get on. Then he goes on: "In *Muller & Dews*, 94 U.S. 444, there "was an appeal to the Supreme Court of the United States from a decree of an Iowa "Court for sale under mortgage of a railway partly in Iowa and partly in Missouri, and "directing the Master of the Court to execute the deed or deeds to the purchaser, that "the Railway Company should surrender the property to the purchaser on execution "and delivery of the Master's deed, and that, as a further assurance, the Company "should convey to the purchaser. This decree was affirmed. Strong, J., who delivered "the Judgment of the Supreme Court, said: 'Without reference to the English Chancery "'decisions, where this objection to the decree would be quite untenable, we think the "'power of Courts of Chancery in this country is sufficient to authorise such a decree "'as was here made.'"

[Adjourned for a short time.]

Mr. BLAKE: Before I resume reading the Judgments perhaps your Lordships would allow me to answer a suggestion made a while ago by one of your Lordships. I had not in my hand at the moment the paper which would enable me to answer it. That is as to the North West Territories' laws as defined by that of which the Court below and this Court takes judicial notice. Revised Statutes of Canada, Chapter 50, Section 11, the organic law which introduces the laws of England, as of the 15th of July, 1870, as the fundamental basis of the laws of the North West Territory. Now to proceed. I was at the bottom of page 48 of the Record. Strong, Justice, the Judge of the Supreme Court of the United States, says: "It is here, un- "doubtedly, a recognised doctrine that a Court of Equity sitting in a State, and having "jurisdiction of the person, may decree a conveyance by him of land situate in another "State, and may enforce the decree by process against the Defendant. True, it cannot send "its process into that other State, nor can it deliver possession of land in another jurisdic- "tion; but it can command and enforce a transfer of the title. And there seems to be no "reason why it cannot in a proper case effect the transfer by the agency of the Trustees "when they are Complainants. . . . The mortgagors here were within the jurisdiction of "the Court. So were the Trustees of the mortgage. It was at the instance of the latter "that the Master was ordered to make the sale. The Court might have ordered the "Trustees to make it. The mortgagors, who were foreclosed, were enjoined against "claiming the property after the Master's sale, and directed to make a deed to the "purchaser in further assurance. And the Court can direct a Trustee to make a deed "to the purchaser in confirmation of the sale." Then Killam, J., goes on:—"I feel "very strongly impressed with the reasons advanced by Chancellor Boyd, and if this "were a case of lands wholly out of Manitoba I might feel at liberty, notwithstanding "the English authorities cited, to take the same course. A sale is very different from "simple foreclosure. The latter would operate to bar a right to enforce redemption in "the Courts of the country where the decree is made, and those Courts "might go as far as in *Beckford v. Kemble*, 1 S. & S., 7, and enjoin "the Mortgagor from seeking redemption in the Courts of the *situs*. So "long as the mortgagor, or owner of the equity of redemption, is within

"the jurisdiction of the Foreign Court, he might be thus enjoined from "asserting any rights as against the purchaser under its decree, and he might be compelled to join in a conveyance. But he may move out of the jurisdiction, or he may "already have disposed of some interest, or created some encumbrance upon the property, or he may do this before the conveyance is completed. And the Courts of the "*situs* may recognise the right of the purchaser. If there are subsequent encumbrances "the Court cannot enforce their compliance with its decree if they are without the "jurisdiction; and in case they are within the jurisdiction the mere fact of their having "such interests in land wholly without the jurisdiction would not seem to create such "a privity or relationship with the mortgagee as to entitle him to proceed against them "here for sale or foreclosure. But the jurisdiction of this Court to decree a sale under "a mortgage of lands within the Province is unquestionable. The only difficulty in "the present instance lies in the nature of the property. As I have already intimated "upon the evidence before me I am of opinion that the portion of the railway within "Manitoba, or any portion less than the whole mortgaged division, cannot be considered to be a 'section' within the meaning of Section 278 of the Railway Act, and "cannot therefore be sold separately. Is it not then necessary for some Court to exercise the jurisdiction to decree a sale of the whole division? The Courts of the North-"West Territories are in no better position than this Court for the purpose, and there-"is no other Court which could possibly interfere. Under the principles enumerated "by Sir John Stuart, V.C., in *Hutton v. Scarth*, 4 Jur., N.S., 450, where the mortgagees are Trustees, they have peculiarly a right to ask that the Court shall protect "them by assuming the control of the sale. The case of *In re Orr-Ewing*, *Orr-Ewing v. Orr-Ewing*, 22 Ch. D. 456, 9 App. Ca. 34, and others there cited, afford examples "how the jurisdiction to administer the portion of an estate within the jurisdiction "draws with it the jurisdiction to administer also the portion situated abroad."

LORD DAVEY: That is a mistaken view of *Orr-Ewing*, which was that an infant had a right to call upon his Trustees within the jurisdiction to account to him for the property received.

LORD HOBHOUSE: People cannot have more right against foreign lands because they are Trustees than they would have if they were not Trustees.

Mr. BLAKE: I see no difference between trust and contract. These are two forms of contractual relation which seem to me equally to give the equity.

LORD HOBHOUSE: The Trustees' and bondholders' contract on one side, and the Company on the other. The circumstance that the machinery of Trustees is used cannot make any difference.

Mr. BLAKE: If it were said that the Court would exercise jurisdiction when the land was beyond the territorial jurisdiction in cases of trust I can understand it, but they do not say that. They say "contract or trust." The learned Judge goes on: "I do not think, however, that this Court could act as the Supreme Court of Penn-"sylvania felt at liberty to do in *McElrath* v. *The Pittsburg and Steubenville R. R. Co.*, "55 Penn. St. 189, and decree a sale of the whole property without considering whether

" it could give effect to its decree as to the portion of the railway outside Manitoba. In " accordance with the views which I have already expressed, the Court cannot act except " with respect to the whole of the mortgaged divison, and it must, therefore, ascertain " before acting that it can confer a title to the whole division. The usual decree for " sale in this Province directs the Master to enquire as to subsequent encumbrancers and " make them parties to the suit, and then after enquiries as to the amounts due and " allowing a proper time for payment, it authorises a sale, which is subsequently had " under an Order obtained *ex parte* in Chambers. If such a decree were made in a case " like the present, and there were found to be encumbrancers residing out of Manitoba, " they at any rate could not be bound to join in a conveyance, or be bound in the " North West Territories by any conveyance in which they did not join, unless one " made by the present Plaintiffs would be effectual under the power of sale contained " in their mortgage. I have hesitated somewhat as to whether the usual decree should " be made, or whether there should be a preliminary enquiry as to encumbrances, and " as to the effect which, under the laws of the North West Territories, a conveyance " by the Plaintiffs under a decree of this Court, and in compliance with the conditions " of the power of sale, would have in the Territories as against subsequent encumbrancers " if such should be found. At one time this Court had an appellate jurisdiction in " respect of the North-West Territories, and it might have been possible for it then in " all cases to take judicial notice of the laws of the Territories. That jurisdiction was " abrogated by the Act 49 Vict., c 25, s. 32 (D. 1886), brought into force by proclama- " tion of the Governor-General on the 18th February, 1887, see Sta. Can. 1887, p. clvi. " It would be an interesting question to consider how far this Court could now take " judicial notice of the validity and effect in the North-West Territories of the power " of sale in the Plaintiff's Mortgage, which bears date the 16th April, 1886." I have already addressed to your Lordships my argument that that is perfectly clear. It is under the law which authorises the mortgage at all, which is the law of the Dominion of Canada, of which law the Judiciary in Manitoba are bound to take notice; and therefore they can see that there is a power of sale equally valid, and to be construed in the same way, equally valid in the North-West Territories, and having the same construction as for Manitoba. It has no local construction for Manitoba; it has no local construction for the North-West Territories. " At any rate I think I can judicially notice for present purposes the 11th Section of " the North-West Territories Act, R.S.C., c. 50, by which the laws of England of the " 15th July, 1870, are in force in the Territories so far as applicable to the Territories, " and save as repealed, altered, varied, modified, or affected by any Act of the Imperial " Parliament applicable to the Territories of the Parliament of Canada, or any Ordinance " of the Lieutenant-Governor, or of the Territories, in Council. And I think that I " can also notice the laws of England at that date, those being the basis of our own " jurisprudence. But I do not conceive that I could take notice of any alteration of or " whether any alteration has been made in those laws by the Legislature of the North- " West Territories since the 18th February, 1887, which would affect an attempt to " exercise this power of sale. It appears to me that under the law of England, as well " as that of Manitoba, the Plaintiffs acting under, and in compliance with the terms of " the power of sale, could make a valid and effectual sale and conveyance of " the mortgaged property, and thereby transfer a good title as against the " Defendant Company, and all claiming any title or interest in the property " subsequent to the Plaintiff's mortgage." I think then that I may properly assume as

" miles of the railway, it would be difficult to hold such a portion to be a section " within the Railway Act. But the 49 Viet. c. 75, s. 4, which deals with the bonds " and mortgage now in question, says that such bonds shall ' be the first lien, and " ' charge on such first division of the railway, comprising 180 miles as aforesaid as " ' provided by the said mortgage deed.' There Parliament seems to have dealt with " the 180 miles as a distinct and separate portion of the road. Then the 56 Vic., c. 52, " deals with securities set out in Schedule 2 to the Act, the first item of these being " the bonds secured by the Plaintiff's mortgage, and Section 18 provides, that the " schedule securities ' shall remain until cancellation or redemption' thereof, or until " ' payment or discharge in full of the principal, and interest thereby secured the first " ' preferential claims and charges upon the respective portions of the Company's " ' undertaking or property affected or charged as security for such payment " ' in each case, and according to the tenor, or effect of any by-law, or " ' any deed of mortgage, conveyance or assurance in each case.' Now do " not the section, and the schedule referred to, not only recognise the distinct and " separate character of the portion of the railway upon which the bonds " are made a charge, but also that it may be sold as a distinct and separate portion, as " a section within *Redfield v. Wickham*. How otherwise can the bonds be a charge " upon this portion of the railway according to the tenor or effect of the mortgage " deed, which contains a power to sell this 180 miles in case of default in payment. " During the argument it was said that the existence of this power of sale cannot be " relied upon or referred to, because it is not set up in the pleadings. But it is so in " Paragraph 16 of the Bill. Another objection taken by the Defendants is that the " Court cannot grant the relief asked, because in doing so it must deal with lands " lying outside of this Province. The Plaintiff's reply that this objection is not open " to the Defendants because it is not properly raised by their answer. It is said, a plea " to the jurisdiction must, in order to prevail, set up not only that the Court has no " jurisdiction, but show what Court has." I have already alluded to that subject and I do not trouble your Lordships further about it. " The argument of the Plaintiffs, " that even if the property is outside the jurisdiction they can invoke the assistance of " the Court because they are Trustees, and the money to be realised by a sale of the " property is to be dealt with and distributed as trust money seems untenable, for no such " case is made by the Bill." I have already addressed such observations as occur to me on that point. " Will the Court entertain a suit to sell lands lying outside the territorial limits " of its jurisdiction ? No doubt old cases can be found in which jurisdiction as to lands " abroad was entertained. In every case, I think, as to lands in dependencies of England, " in the Colonies, and Plantations, as the expression then used was. This jurisdiction " was, perhaps, carried further by Lord Hardwicke, than by any other Judge, and seems " to have been founded on some vague idea that the Courts in England had a general " jurisdiction over all parts of the Empire. What Lord Macclesfield called ' the super- " intendent power of the Courts in this Country,' in *Fryer v. Bernard*, 2 P.W., 261. " In *Roberdeau* v. *Rous*, 1 Atte., 543., in which, however, even Lord Hardwicke refused " to order delivery of possession of lands on the Island of St. Christopher,' this " language occurs, ' Plantations are originally members of England, and governed by " ' the laws of England, and persons went out originally subject to the laws of " England, unless in some regulations and customs which they have a power of " ' making.' The modern cases disclaim the exercise of any such wide jurisdiction, " although, no doubt, where the parties are within the jurisdiction, the Courts may, and

" do. act *in personam*. Among the cases cited, *Hendrick v. Wood*, 9 W. R. 588, was " a case for winding up a partnership in Jamaica, three executors living in England, " and three in Jamaica, who had appeared to the suit, and an arrangement having been " made in England before the testator's death for the winding up. There the Court " was acting *in personam*. In *Central Railway and Banking Co. v. Mitchell*, 11 Jur., " N.S. 258, the Court was asked to protect a fund, the proceeds of the sale of the " assets of a steamship company in the United States, which had by an express agree- " ment among the shareholders, been remitted to England for the purpose of being " divided there. The Court was there dealing with a fund remitted to, and in the " hands of a firm in Liverpool. The plea was not to the jurisdiction on the ground " that the subject matter of the suit was abroad, but simply that the fund was not " invested in any Government or public stock in England. *Orr-Ewing v. Orr-Ewing*, " 22 Ch. D., 456 ; 9 A.C., 34, was also a case for the administration of an estate."

LORD DAVEY : Therefore you could not serve parties out of the jurisdiction That is the meaning of that.

Mr. BLAKE. Yes. " In *Smith v. Henderson*, 17 Gr. 6, the Court acting *in* " *personam* as against a Defendant, within the jurisdiction decreed a trust of land " abroad. In *Grant v. Eddy*, 21 Gr., 45, the estate assigned for the benefit of creditors " was in Quebec, and the assignor lived there, but the Plaintiff and the Trustees were " resident in Ontario, and the assignment provided for the trust funds being, when " collected, paid into a bank in Ottawa. These were all cases in which the Courts " professed to act, and did not act upon persons within the jurisdiction *in personam*. A " foreclosure decree being a decree *in personam* depriving the mortgagor of his personal " right to redeem, the Court may, where the parties are within the jurisdiction, make a " decree foreclosing a mortgage upon lands abroad, as was done in *Paget v. Ede*, L.R. " 18 Eq., 118, but it is different where the relief sought is a sale of the land. That is " a proceeding against the land directly. And as was said by the Master of the Rolls " in *Lord Cranston v. Johnston*, 3 Ves. 170, 'Bills are often filed upon mortgages in the " West Indies. The only distinction is that this Court cannot act upon the land " directly, but acts upon the conscience of the person living there.' " I shall not stop to show your Lordships what the action was, but it was very strong.

LORD DAVEY : It is supported on principle.

Mr. BLAKE : Yes. " So in *Carteret v. Petty*, 2 Swanston 323 N, the Court " made a decree for an account of waste committed in Ireland, but refused to order " partition for that was a proceeding *in rem*. A decree for the sale of mortgaged " lands seems to be a proceeding *in rem*, for although there is a money demand, on " which the Court first adjudicates, it proceeds to act upon the property directly, and " decrees a sale of it in satisfaction of the demand. That a decree for sale " is a proceeding *in rem*, seems to have been held by Boyd, C., in " *Strange v. Radford*, 15 O.R., 145. In all the modern cases where it " has been sought to affect not the parties *in personam*, but to affect directly " lands abroad, the Courts have disclaimed jurisdiction." Then he cites the Norris case, which I have already read largely to your Lordships, and he refers to

"against the Defendant Company, in the absence of allegation or evidence to the "contrary, that such a sale and conveyance under a power contained in the Company's "own deed, would be similarly valid and effectual as to the portion of the mortgaged "property situated in the North-West Territory. If this be the case the only obstacle "to the exercise by this Court of its jurisdiction to decree a sale of mortgaged property "within Manitoba—the circumstance that it must assume also to decree a sale of "immovable property out of Manitoba disappears; and if it can be surmounted it seems "to me that the Court is bound to make the decree, taking care only that the decree "shall require the conditions of the power of sale to be complied with. As to the "appointment of the Receiver the fact of a portion of the mortgaged property being "without Manitoba can be no bar. In *Houldsitch v. The Marquess of Donegal*, 2 Cl. "and F. 470 on an Appeal from Ireland, the House of Lords not only upheld the juris-"diction of the Court of Chancery in England to grant a Receiver of the rents and profits of "an estate in Ireland, but also held that it was the duty of the Courts in Ireland to "assist the Receiver. See also *Hibbert v. Hibbert*, 3 Mer., 681 ; —— *v. Lindsay*, "15 Ves., 91 ; and *Bunbury v. Bunbury*, 1 Beav., 318., 8 L. J. Ch. 297. There will "be a decree continuing the present Receiver on his giving such further security, if "any, as the Master shall deem necessary, with other usual provisions ; directing an "enquiry as to the personal property embraced or included in the Plaintiff's mortgage ; "and directing the usual enquiries, &c., as in an ordinary suit for sale under a "mortgage, showing, however, that the conditions of the power of sale contained in "the mortgage deed are to be complied with before sale."

LORD SHAND : What are those conditions ?

Mr. BLAKE : Twelve months' default and an advertisement in Winnepeg for six weeks. "The Decree should also declare that the Court does not at present see "fit to determine whether the Defendant Company is entitled to have the revenues, "freights, tolls, income, rents, issues, profits, or sums of money arising or to arise "from the use of the first division or portion of the railway and telegraph, and other "property mortgaged to the Plaintiffs, or any part thereof applied to the working "expenses of any portion of such railway, telegraph, or other property not comprised in "the Plaintiff's mortgage, or any portion thereof, or to meet any other payments or "disbursements in respect of property not comprised in such mortgage, and leave to "apply in respect thereof, should be reserved. According to the statements made by "Counsel at the hearing, it seems unnecessary for present purposes to settle this con-"troversy, and it may never become necessary to do so, even if such a determination "were made between the present parties it would not affect subsequent encumbrancers "who might litigate it again."

Then, continuing, at the foot of the same page is the Judgment of the Chief Justice in the Court of Appeal. It is not necessary to trouble your Lordships with the statement of the facts. He says that on the 16th of April, 1886, the Defendants had constructed 130 miles only, and that they were then engaged in constructing the 50 miles additional. The rest, as your Lordships see, is narrative. Then there is a statement at the foot of the page of the petition presented in *Allan v. The Manitoba and North-Western Railway* for leave to enforce their rights as mortgagees. "The petition

" came before the Full Court upon a re-hearing, and it was then held, that upon default " in the payment of interest, the Trustees, the present Plaintiffs, could have filed a Bill " for sale of that division of the railway mortgaged to them, and an order was made " giving them leave to take such proceedings as they might be advised, for, among " other things, a sale of the property embraced in their security. What the Court " when it so held was dealing with was, the contention of the Plaintiffs in " that suit, that the mortgage containing a power of sale, the rights of the " Trustees the present Plaintiffs, must be governed by that, and there could be no " sale until after default for twelve months in the payment of interest upon the " bonds." I have already stated that default had occurred before Bill filed and it is stated in the Bill as one of the allegations material in the cause. " Bearing in " mind the question with which the Court was then dealing, I cannot see in that " judgment anything to prevent the Defendants from taking, as they now do, the " objection that the property covered by the Plaintiff's mortgage, the 180 miles, or as " it is called, the first division of the railway, is not, or at all events has not, been " shown to be liable to be sold under Section 278 of the Railway Act." Then *Redfield v. Wickham* is cited, and the Judgment continues :—" The Defendants' contention is " that the sale of a railway having been held to be against public policy, and Parlia- " ment having by statute modified the law, and permitted a sale under certain " limitations, the onus lies on the Plaintiffs to bring themselves clearly within the " provisions of the statute. The Plaintiffs' answer to this, that the Defendants having " given a mortgage upon the first 180 miles, with a power of sale, they have by their " own deed established, as against them, that this portion of the railway is a section " which may be sold, does not seem to me conclusive upon the subject. The statute " permits the sale of a section, which it has been decided must be an integer ; " if this 180 miles is not such a section within the meaning of the statute, " then the deed cannot be any estoppel, for if a deed has been executed in contraven- " tion of a statute the law of estoppel does not apply." Then he cites cases, and goes on : " The question remains, is the 180 miles known and spoken of as the first division, " such a section as is saleable under the Railway Act ? In my opinion it lies upon " the Plaintiffs to show that it is, and they offered no evidence on the subject. The " only evidence touching upon it came from the Defendants, that the railway, starting " at Portage la Prairie, and running 223 miles in a north-westerly direction to Yorkton, " is with the Shell River branch operated as one railway. But the Plaintiffs in " support of their contention appeal to the whole course of legislation in connection " with the bonds which their mortgage was given to secure. The 46 Vict., c. 68, s. 5, " under which the bonds were issued, and the mortgage given, provides that the Com- " pany may issue bonds, which ' shall constitute a first mortgage and privilege upon " ' the said undertaking, and upon the said railway constructed, and to be there- " ' after constructed ' ; that the bonds may be so issued in proportion to the " length of railway constructed, or under contract to be constructed. And it further " provides that the Company may secure the bonds to be issued ' by mortgage deed " ' creating such mortgage, liens, and incumbrances upon the whole, or any part of " ' such property, assets, and revenues of the Company present or future, or both, as " ' shall be described in the said deed.' This, standing alone, could not be relied " on as establishing that any particular portion of the line of railway " described in a mortgage, is a section, for if the Company found a lender " willing to advance money and take a mortgage upon a single mile, or upon a few

several cases in the province of Ontario. He says:—"In Ontario there have been "several cases in which this question has been considered. One of these relied on by "the Plaintiffs was *Robertson v. Robertson*, 22 Gr., 449. But there was in that case "no sale of land, or direct dealing with land. There, there was a sale, and, following "that, a vesting order, vesting in the purchaser certain bounty land warrants, which "seem to have given the bearer of them a personal right to locate and obtain from the "Crown so many acres of unascertained lands in Manitoba, and the question disposed "of by Proudfoot, V. C., was that infants, being like adults bound by proceedings in a "suit in which they are Plaintiffs, the decree and proceedings would be an answer, and "bind them and estop them from disturbing any title acquired under the sale of the "warrants. *Strange v. Radford*, 15 O. R., 145, was an action against a Defendant "living in Ontario, upon a mortgage of land in Manitoba, for sale, delivery of "possession, and relief under the covenant for payment, and the relief prayed "was refused by Boyd, C., who while he held the Plaintiff might have an "order of foreclosure which operates only as an extinction of the mortgagor's "personal right of redemption, said 'to carry out a sale, it is essential "'that the Court should have territorial jurisdiction over the land.' In *Burns v.* "*Davidson*, 21 O.R. 547, the Court was asked, all parties living in Ontario, "to set aside as fraudulent a conveyance made by a debtor of land in a foreign country, "and a demurrer to the Statement of Claim was allowed. Boyd, C., after speaking of "the earliest cases found in the books, went on to say, 'But these cases, if ever safe "'guides (which is much to be doubted), do not justify a Provincial Court inter-"'meddling with territorial rights acquired or subsisting in a foreign country.' He "said further, that as against the general expressions used in earlier cases, he preferred "to follow the more guarded lines of jurisdiction, which obtain in recent decisions, of "which one of the most important was *Harrison v. Harrison*, L.R., 8 Ch. 346. In "that case a decree of the Master of the Rolls made in an Administration suit, and "holding Scotch real estates liable to the payment of debts, as between the heir and "the pecuniary legatees, was reversed by Lord Selborne and Lord Justice Mellish, the "former saying:—'As against the real estate in Scotland the Courts of England have "'no jurisdiction at all.'" I have to trouble your Lordships with a brief reference to a larger extract from that case, in order to see exactly what it did do. At page 349 Lord Selborne says:—"In the first place, as against the real estate in Scotland, the "Courts of England have no jurisdiction at all. Any jurisdiction which they "can exercise as to the real estate in Scotland can only be through the "medium of some personal equity attaching to the owner in Scotland of that "real estate, who is in this case the Scotch heir. What is that personal "equity? There is no fiduciary relation. What right have these legatees, upon "the footing of personal equity, to say that the heir shall not enjoy the Scotch "real estate as the law of Scotland gives it to him, or that any burden shall be directly "or indirectly thrown upon that real estate in their favour which would not be "imposed by the law of Scotland? It seems to me quite clear that the Court cannot found "such an equity upon the accident of the heir at law being before it as a party to the suit. "The equity must be founded upon some higher principle. The fallacy, which "pervaded the whole of Mr. Anderson's argument was this, that he assumed the "Scotch estate was properly brought into this Court as the forum of administration. "But without first showing what this Court has to do with the Scotch real estate, and "why it ought to be done, the proposition is not made out. There are in point of fact

"no debts to be paid out of the Scotch real estate; there are no trusts to be executed "as to the Scotch real estate: there is no contract to be enforced as to the Scotch real "estate, and unless this point is settled in Mr. Anderson's favour, that the "indirect burthen is to be thrown upon the real estate in Scotland in "favour of these legatees, which is the very matter in controversy, it "is not here in the proper forum of administration." That is the case of *Harrison v. Harrison*, which is shortly stated by the learned Judge; but my larger extract, from which shows, as I maintain, that the case is not an authority against me, but that it states three classes of interests or privity, or relation which would have justified interference so recently as of that day. Then in the Record the Judgment goes on: "In *Ross* v. *Ross*, 23 O. R., 43, Street, J., held that the Court could not "entertain an action for determining the title to land in the North-West Territories, "even where the parties were resident within the jurisdiction." Then he deals with *Henderson v. The Bank of Hamilton*, which I need not trouble your Lordships with, and then he takes the case of *Companhia de Moçambique v. British South Africa Company*, and points out that that is said to be the culminating case. I have already read more to your Lordship from that case than is given here. He concludes: "In my opinion "the Court cannot consistently with the authorities make a decree for the sale of land "over which it has not territorial jurisdiction. While the 180 miles, forming the "first division of the railway, may be a section capable of being sold under the Rail-"way Act, there is nothing to warrant a sale, as a section of that part, which lies "within the province. As then the Court cannot sell the whole, because part "lies outside the jurisdiction, it follows that no decree for sale can be made "at all. It was argued that if this Court cannot order a sale there is no other Court "can do so, and that seems to have weighed with the learned Judge at the original "hearing in coming to the conclusion he did. That argument was most effectually "disposed of by Lord Esher in the case last referred to, where he said 'As to the con-"'tention that the Courts of a country can assume jurisdiction in respect of extra-"'territorial acts over which they have otherwise no jurisdiction, on the mere ground "'that, if they do not, the Plaintiff has no remedy anywhere, I am of opinion that it "'does not bear examination. It is claiming too ambitious a province. It was a noble "'ambition, but it is without recognition or authority.' There still remains the "question of the working expenses of the railway. Are the working expenses of the "entire railway entitled to priority in order of payment over the bonds, or only the "working expenses of the 180 miles, or first division, upon which payment of the "bonds has been secured?"

LORD SHAND: What mileage is there in that? He uses the expression, "the entire railway."

Mr. BLAKE: At the moment some 243 miles—potentially 440 miles.

LORD SHAND: It is about 240 miles.

Mr. BLAKE: Unquestionably it means the railway constructed or to be constructed. My learned friends contend that there, besides, are two branches with which I

have not troubled your Lordships. He goes on :—"The Company, although in "the first instance incorporated by an Act of the Legislature of Manitoba was by "45 Vic., c. 80 (D), declared to be a work for the benefit of Canada, and it was "authorised to extend its line of railway to Prince Albert. Of the whole line of "railway provided for in this Act the Company has constructed, and has in operation, "223 miles, but of this the Plaintiffs' security covers only 180 miles, called the first "division. That Act gave the Company power to issue Bonds for the purpose of "raising money for the prosecuting of their undertaking, and they were "empowered to secure these bonds by a mortgage deed creating such mortgages, "charges and encumbrances upon the whole or any part of the property, assets, rents, "and revenues of the Company, present or future, or both, as shall be described in the "deed, 'but such rents and revenues shall be subject in the first instance to the "'payment of the working expenses of the railway.' The 46 Vict., c. 68, s. 5, "authorised the issue of bonds which should constitute a first mortgage and privilege "upon the undertaking, and upon the railway constructed, and to be thereafter "constructed and upon the property of the company acquired, or which might be "thereafter acquired—excepting therefrom municipal bonuses—and upon the tolls and "revenues derived from operating the railway, 'after deducting from such tolls and "'revenues of working expenses.' And provision was made for securing the "bonds by mortgage deed upon the whole or any part of the property, assets, "and revenues of the Company, present or future, or both, as shall be described in the "deed ; 'but such revenues shall be pledged in the first instance to the payment of "'the working expenses of the railway,' The words used in these sections in their "ordinary and natural meaning apply to the entire railway then constructed, or which "the Company had power to construct thereafter. I do not see how they can be "limited to a portion only of the railway, which may be described in a mortgage deed. "Turning now to the mortgage under which the Plaintiffs claim, it will be seen that "the construction of a railway 430 miles in length is plainly referred to, and the "entire railway is throughout spoken of as 'the said railway' or 'the railway of the "'Company.' What the deed conveys to the Plaintiffs is the first division, or portion "of the railway and electric telegraph of the Company, extending from the point of "junction with the Canadian Pacific Railway, to a point distant 180 miles therefrom, "etc., with all the other real and personal property, rolling stock, etc., held or belonging "to, or thereafter to be acquired by the Company for use in the construction, main-"tenance, and operation of such first division or portion of the said railway and "telegraph, and all revenues, freights, tolls, income, rents, issues, profits, and sums "of money to arise from the use of the said first division, or portion of the said railway, "or telegraph, etc., 'subject, nevertheless, to the working expenses of the said railway "'and telegraph.' In that part of the deed the first division, which the mortgage "covers, is carefully distinguished from 'the said railway.' The words 'the said rail-"'way' there must refer to the entire line of railway, and cannot be confined to the "first division only. In no other place in the deed can they be confined to the first "division, and it is most unlikely that they are so here." I have already pointed out the misapprehension under which the learned Judge laboured, showing that time and again the contrary of what he avers occurs in the deed. "The Plaintiffs argue that "the language used in the second article explains the meaning of that used in the "earlier part of the deed. That article empowers the Plaintiffs, in the event of default, "to enter into possession of, and to operate and conduct the business of the said first

" division or portion of the railway and telegraph, and after 'deducting the expenses of " 'operating the said division or portion of the said railway and telegraph, and conducting " 'the business thereof' to apply the moneys. &c. But the meaning of the language used " in the operative and granting part of the deed, seems too distinct to admit of its being " explained away by a subsequent and subsidiary clause. Another article relied on by " the Plaintiffs is the 18th. but that does not assist in explaining the meaning, because " it is only a covenant by the Defendants to pay the interest and principal of the bonds, " and that they will for that purpose 'faithfully use and apply the net earnings and " 'income to be from time to time derived from the said division or portion of the said " 'railway and telegraph, or from any part thereof, after deducting its obligations upon " 'or with respect to prior liens thereon.' What the prior liens may be it is not said. " The net earnings may very well be the earnings after the working expenses of the " entire railway have been provided for. Even if it could be successfully argued that the " mortgage intended to make, and does make, only the working expenses of the first " division, a charge in priority to the bonds, then I think it would be necessary to hold " that such a provision is *ultra vires*. There can be, I think, no doubt that the statute " under which the bonds were issued makes any bonds issued under its provisions, even " if a charge upon part only of the railway, subject to payment of the working expenses " of the entire railway. It may be that to so hold will lessen the value of the bonds " materially, but that is not a question to be dealt with by me. Public policy seems " to be that a railway shall be kept in operation for the benefit of the public by the " Company. No doubt it is to secure this that the Statutes say, the earnings of the " whole road, and of every part of it, must in the first place go to meet the expenses of " working the road, and keeping it in operation. The interest of the public is placed " before that of private individuals. The Plaintiffs are, however, entitled to part of " the relief sought. They are entitled to have a Receiver, an account of the amount " due upon the bonds, and an order for the payment of that amount into Court. They " are also entitled to an inquiry what personal property is embraced or included in " their security, and to have that sold. The decree may contain a declaration that the " working expenses of the entire railway are a charge in priority to the bonds."

LORD SHAND: Would personal property include railway carriages and plant?

Mr. BLAKE: Yes, on the division, and they are ordered to be sold by this decree.

LORD MORRIS: The Statute which he says is inconsistent with the mortgage, is, I suppose, the 46th Victoria, section 5?

Mr. BLAKE: Yes: I have had first of all to deal, as I tried to deal with the meaning of that Statute, then with the meaning of the mortgage, and then with the legalisation of the mortgage as it stands.

LORD HOBHOUSE: He does not say anything about the Statute governing the mortgage. That seems to be an answer to his objection that if your construction of the mortgage is right, it is *ultra vires*?

Mr. BLAKE: I think so.

LORD DAVEY: It is not an entire answer to it, because you may say this—that at the time when the mortgage deed was framed, it was framed with reference to the Act. It could not go beyond the Act at that time at any rate, and if it will bear a construction which will bring it into accordance with the Act under which it was made, it ought to receive that construction.

LORD HOBHOUSE: As an argument on construction that may be worth considering, but that does not make it *ultra vires*.

Mr. BLAKE: Of course, I agree that upon the fair construction of this mortgage, independent of any subsequent authority one way or the other, it is in favour of my client, and that being so, it is legalised by the subsequent Statute, and, therefore, it is not necessary to find precedent authority, but I have argued also that precedent authority exists in the Act Lord Morris has referred to.

Then the puisne Judge, Mr. Justice Bain, says this: "It would be a somewhat "difficult matter to define precisely what is meant by the words 'any section of any "'railway,' in Section 278 of the Railway Act."

LORD SHAND: I suppose there is no question that the decree made was varied so as to carry out precisely that opinion, as to the matter of the expenses, for instance?

Mr. BLAKE: That is my interpretation of it.

LORD SHAND: It would only be bearing out what the learned Judge said.

LORD DAVEY: A charge not on the railway.

LORD SHAND: But on the revenue.

LORD WATSON: The learned Judge points out how it is obtained. It is a very simple operation, so far. You have to deduct expenditure from receipts, and divide that rateably between the different sections of the line.

LORD SHAND: Did I understand the learned Judge to say you are not to take anything rateably; you are to deduct the whole expenses?

Mr. BLAKE: No.

LORD SHAND: I think he does not say that they are to go off the whole earnings.

LORD WATSON: The whole expenditure on the other sections of the line is to remain to its proper extent a burden upon the receipts.

LORD SHAND: I had read it as not bringing in the whole income.

LORD DAVEY: Then you would have this: that if there were two sections mortgaged, Section A to one set and Section B to another set, you would have each charged on the whole.

Mr. BLAKE: Well, then, Mr. Justice Bain says, "As Parliament, however, has "expressly recognised these 180 miles as a division of the Defendants' Railway sepa- "rately charged by the bonds and mortgage, it seems reasonable to suppose that in so "recognising it it was intended that the Division would be deemed to be a section of "the railway in respect of which the holders of the charge could exercise the remedies "the Act gives them for enforcing or realising the charge. But if the Court has juris- "diction to decree a sale of only a railway, or any section of it, there clearly would not "be jurisdiction to order the sale of anything less than the whole division of 180 miles. "There is nothing before us that would justify the Court in treating any portion of "the division as a separate section, and as Lord Watson said in *Redfield* v. *Wickham*, "13 Ap. Cas. 467, it is still the policy of the law that a railway is not to be disin- "tegrated piecemeal. The Plaintiffs' Bill is substantially the usual one on a mortgage "for redemption or sale, and the prayer for sale is 'that all the property described in "'said Indenture may be sold under the directions of this honourable Court, and that "'the Plaintiffs may have liberty to bid at such sale.' The decree directs that all "necessary enquiries be made, accounts taken, and proceedings had for redemption or "sale, and that for these purposes the cause be referred to the Master. In making "such a decree the Court is, as I understand it, undertaking to deal directly with the "property in question, and not merely indirectly through the Defendants; and the "decree is one *in rem* and not *in personam*. But part of the immovable property that, "if it is sold at all, must be sold as a whole, lies in the North-West Territories, outside "Territorial Jurisdiction of this Court; and on this ground exception is taken to the "jurisdiction of the Court to make the decree for sale. Most of the difficulty there is "in deciding this question arises from the fact that it is only a portion of this property "that is outside of the Province. Had the whole of it been outside the Province I "would hold without hesitation on the case made by the Bill that the Court should "refuse to make a degree for sale; and I gather from the Judgment of the learned "Judge who made the decree that this would have been his opinion also. But I "venture to think that, on principle, the objections to the Court undertaking to make "a decree directly affecting this property are just the same, and as weighty as they "would be were the property wholly outside the Province, and all the difficulties "that Boyd C., suggests in *Strange* v. *Radford*, 15 Ont., 145, might be "found in the way of enforcing the decree. And the consideration that if this Court "will not decree a sale the Plaintiffs will be practically unable to enforce their remedy "is not one, I think, that should influence the Court to assert a wider jurisdiction than "principal and authority warrant. This is a consideration for Parliament to deal with "rather than the Court. The English Court of Chancery, it is said, has pushed its "jurisdiction with respect to foreign lands farther than any other Court, and farther

"than the general principles of jurisprudence warrant. But except, perhaps, in a few "cases where decrees were made directly affecting lands in the view that the process of "the Court would extend to the British Plantations and Colonies, the principle has "never been lost sight of that the Court cannot directly interfere with foreign lands; "though it has attempted to do indirectly what it could not do directly. The doctrine "of the Court is that the Court having authority to act upon the person may indirectly "act upon real estate situate in a foreign country through the instrumentality of the "person; and it is altogether on this doctrine that the jurisdiction the "Court takes to decree foreclosure of foreign mortgages is exercised. A "decree for foreclosure, as Bacon, V. C., explained in *Paget v. Ede*, L. R. 18 Eq., 118, "is a decree *in personam* depriving the mortgagor of his personal right to redeem, and "it does not directly affect the mortgaged land. On the other hand, the case of "*Roberdeau v. Rous*, 1 Atte., 543, is one that shows emphatically that the Court will "not make a decree that directly affects foreign land. There a Bill had been filed for "the partition of an estate in the West Indies. But Lord Hardwick said:—'This "'Court has no jurisdiction so as to put persons in possession in a place where they "'have their own methods on such an occasion to which the parties may have recourse; "' . . . . . lands in the plantations are no more under the jurisdiction of this "'Court than lands in Scotland, for it only *agit in personam*.' An authoritative state-"ment of the principle on which whatever jurisdiction the English Courts have "assumed over foreign lands is based, and of the limitations of that jurisdiction, is "found in the Judgment of the Lord Chancellor in *Orr-Ewing v. Orr-Ewing*,"—and then that is stated, of which I have read a larger extract. "In the suit before us, "however, no case is made for relief on this personal ground. The Court is asked not "to compel the Defendants personally to perform or carry out any duty or obligation "they owe to the Plaintiffs, but to make a decree that would directly affect and deal "with land that is out of its jurisdiction.' On the authority of the cases I have cited, "as well as of the numerous cases that the Chief Justice has just referred to, I agree "that it should decline jurisdiction to do this. These considerations do not apply to "the decree so far as it directs an account and sale of the personal property covered by "the mortgage. '*Mobilia sequuntur personam*,' or in other words, as Lord Selborne "said in *Peak v. Carbery*, L.R. 16 Eq., 466, 'When *mobilia* are in places other than "'that of the person to whom they belong their accidental *situs* is disregarded, and "'they are held to go with the person.' Some time ago on a petition in a suit of "*Allen v. The M. & N. Ry. Co.*, the present Defendants, I had to consider the question "that is raised in this suit whether the working expenses of the whole railway or of "the division of 180 miles only are the first charge on the tolls and earnings of the "division."

LORD SHAND: Again you get the same expression "tolls and earnings of "the division."

Mr. BLAKE: "The opinion I then expressed was that the tolls and earnings "of the division were mortgaged to the Trustees subject to the payment of the working "expenses of the entire railway."

LORD WATSON: That is intended as a direction to the Receiver. All they

did was to appoint a Receiver : and in that part of the mortgage which relates to the receipts to be taken as receiver the language is quite different.

Mr. BLAKE : It still remains that until a sale takes place, and the complete severance is effected, it creates a charge upon the whole gross earnings of the first Division to meet any deficiency in the working expenses of the remainder of the road.

LORD MACNAGHTEN : Why not ?

Mr. BLAKE : Because it would destroy the value of the bonds.

LORD MACNAGHTEN : Any other would destroy the value of the railway.

Mr. BLAKE : Then the railway is not worth anything.

LORD MACNAGHTEN : Very likely.

Mr. BLAKE : The object of having the security on the part was to improve the position over that which existed before of having the security on the whole, just because the part not yet constructed was more speculative, and this was a better security than a security which would have existed by a *pari passu* bond over the whole. The proposed plan is one which does not give to the Plaintiffs the benefit of any surplus of earnings.

LORD MACNAGHTEN : No; but it gives them the opportunity of severing the concern, and either entering into possession of it, or selling that portion which is mortgaged, but until that is done I do not see anything unreasonable in the working expenses of the whole line being charged on profits of the whole and every part.

Mr. BLAKE : I think, subject to the 18th article, there is much force in what your Lordship has just said. The 18th article provides for the case until there has been severance. It provides for a certain interest in my clients even so long as the Company is working and there is no Receiver, no entry by the Trustees, still less any sale. There is the explanation of the rights during that time. I do not repeat what I said, but I argued that question a while ago. That deals with that case. Then another set of circumstances is created when the Trustees take, and it is dealt with in Article 2 ; and still a third when there is a complete severance and a sale.

LORD MORRIS : Is there any difference between whether the Trustees themselves enter, or enter by a Receiver ?

Mr. BLAKE : I thought not, because the Receiver is a receiver of a part.

LORD DAVEY: Surely there is this difference: that the Trustees operate, and for the purpose of operating the line that portion of the line is severed from the rest of the undertaking, and becomes a separate entity, whereas if you put in a Receiver to receive——

LORD MACNAGHTEN: He is not Receiver and Manager?

LORD DAVEY: No. There is no separation in point of operation and working of this division from the rest of the undertaking. No doubt there is all the difference in the world between the two cases.

LORD WATSON: In the case of a Receiver must not the profits of Section No. 1 be dealt with in precisely the same way as if there had been no Receiver. Does not the Receiver take from the Company that which but for the appointment of a Receiver would have been payable to the mortgagees?

LORD DAVEY: He is not the Manager. He does not operate it.

Mr. BLAKE: He is the Receiver of the revenues of the part, and of the part only, not of the whole line.

LORD WATSON: He is the Receiver of that annual payment and receipts of the first section, which would be due in the absence of his appointment, to the mortgagees.

Mr. BLAKE: If that is the view your Lordships are disposed to take of the case, it is clear that there are four, and only four, possible situations: first, before there is any Receiver, or any entry into possession at all, Article 18 governs, and I have already addressed to your Lordships my argument upon that. Then, according to your Lordships' view, if there is a Receiver Article 18 must still govern, that is to say, the Receiver takes what the Company would have been bound to give. Then, third, if the Trustees enter into possession they take under Article 2 and Article 6.

LORD WATSON: That becomes an important question.

LORD HOBHOUSE: You may enter.

Mr. BLAKE: I mentioned that.

LORD HOBHOUSE: I thought you first mentioned what you were entitled to receive under Article 18 from the Company when there is no interference.

Mr. BLAKE: No interference, but still an obligation.

LORD HOBHOUSE: You may enter or you may sell; but you have done neither of those things. You have sought to sell, no doubt. You have a Receiver appointed.

Mr. BLAKE: I cited the Receiver as the second situation.

LORD HOBHOUSE: Well, then the entry is the third proposition and the sale is the fourth.

Mr. BLAKE: Yes; that is what I stated. I suggested to his Lordship, Lord Watson, that if his view was that there was still to be, in consequence of the Receiver not being a manager, a working of the whole enterprise as one, Article 18 would govern the position of the Receivership as well as the position anterior to the Receivership. Then when you get the possession you get Articles 2 and 6, and when you get the sale you get Article 3.

LORD DAVEY: As to Article 2 that necessarily is so, because if the Trustees were operating the railway, either by themselves or by a manager judicially appointed, they must be entitled to be indemnified; they have no expenses except the expenses of operating that particular thing, and then that is right.

Mr. BLAKE: Yes: what we desire is a declaration of our rights.

LORD DAVEY: You see the distinction?

Mr. BLAKE: Yes; I only invite your Lordship to consider, with a view to disposing of this——

LORD DAVEY: I have not lost sight of your argument.

Mr. BLAKE: I was not going vainly to repeat it.

LORD WATSON: The language employed to define the reductions which are to be made from the receipts of Section 1 after the mortgagees have entered into possession is different.

Mr. BLAKE: I invite your Lordships to decide what our rights are if we do take possession, and what our rights are after sale.

LORD WATSON: Before there is any possession taken by the Mortgagees it became the duty of the Mortgaging Company to treat that section, No. 1, as if it were a separate undertaking.

Mr. BLAKE: I rest it on Section 18. If you look at that the whole scope of my argument on this head is inside the limits of it; and I do not repeat it. The rights of my clients, at any rate before possession, would depend on the construction of Section 18.

Mr. EWART: My Lords, after such a lengthened argument my remarks must necessarily be supplementary rather than present a complete statement of an argument. The first question to which I address myself is the one which Mr. Blake has just been dealing with, namely the application of the revenue prior to the sale. It appears to me, for the purpose of considering that question, the deed can very well be divided into two parts. We may look in the first place at what is granted, and in the second place, which is the rest of the deed, at the machinery which is given us for working out the rights of the parties, or, in other words, we can take in the first place from the granting clause what are the rights which we have got under this deed, and in the rest of the deed—the second part of the deed for this purpose—what are the rights as worked out by the machinery.

LORD SHAND: What are the remedies.

Mr. EWART: Yes, and what are the rights which we arrive at by the machinery provided, what are the rights given, and what are the rights which we have reached if we work on the machinery provided. I cannot be wrong, I think, in assuming that the construction will be, if possible, that which will make these rights identical. We will not expect to find rights granted different from those which the machinery will work out. It is a question then of the construction of the language in the grant of the first part of the deed, and we must arrive at that by an examination of the second part of the deed, because, as my leader has shown, I think satisfactorily, the words, "the expenses of the railway" are ambiguous.

LORD DAVEY: Not when they are used with the context and contrasted with the first division.

Mr. EWART: Ambiguous, I think, for this reason, that in five other parts of the deed that expression is clearly used to indicate the first division.

LORD DAVEY: Where the context shows it is; but here it occurs in the granting part of the deed; it occurs in the context to show that it is in contradistinction to the first division.

Mr. EWART: Is that so? Can we show by an examination of the whole deed that these words are sometimes used to mean the first division, and sometimes otherwise? It so happens, no doubt, that on the first three occasions on which the word "railway" is used, it is used in connection with the words "first division," and then the fourth time it is used it is "the railway." I think too much stress cannot be given to that. It cannot be said, therefore, that that is used in contradistinction. When we

come to Section 2 or Section 3 we find that the Trustees can take possession of the first division and sell it, and may convey the railway. Clearly enough that means the first division ; the context shows that it must be so. Therefore, we arrive at this, that the Chief Justice was wrong in saying that the words "the railway" always mean the entire railway in this document.

LORD SHAND : That I think has been demonstrated ; you made that clear ; but still it does not remove the observation made by Lord Davey, that wherever you find it to be taken in the narrower sense, the context leads you to that narrower sense.

LORD DAVEY : Where you find it in the granting part you have a context which leads you to the opposite view ; at page 72 between lines 7 and 10.

Mr. EWART : But if I have established that the words "the railway" do not necessarily mean the entire railway, but are used in the deed to mean the first division, then that helps me at all events in the argument which I now address to your Lordships, and that is this, that contrasting the first part of this deed for this purpose with the second part, the words "the railway" in the first part are shown to mean the first division of the railway, because the machinery which is provided for working out the rights spoken of in the first part of the deed inevitably lead you to that. One could not find and would not expect to find this in the deed, if the grant of the rights is subject to the larger charge, that is, for the working expenses of the whole line—if that is the effect of the grant one would not expect to find that the machinery to enable us to work out that right would enable us to take the revenue and pay the smaller charge ; and yet that is what our opponents' argument is.

LORD DAVEY : It must necessarily do that because they are the only charges to fall upon.

Mr. EWART : Would we expect to find this, that if we have the revenues granted to us subject to a larger charge then when we take possession we are only to pay the smaller charge ?

LORD DAVEY : Yes : because they cease to be revenues of the undertaking. When you take possession and operate it yourselves it is severed from the rest of the undertaking.

LORD SHAND : That may be the effect of it, but the argument I understand is that it is an extraordinary result that when you do proceed to take your remedy you get a better security—a much larger security.

Mr. EWART : Yes.

LORD SHAND : You get rid of a large burden which you would otherwise endure.

Mr. EWART: Quite so.

LORD HOBHOUSE: These words are words of assignation of security. The receipts of the railway in the hands of the Company are assigned, and it may be that you get a larger rate of receipts after you possess yourself of it.

LORD DAVEY: I cannot imagine any sane Legislature ever allowing a Railway Company operating an entire undertaking to mortgage any part of its revenues until all its expenses are paid.

LORD WATSON: It is the half of the whole—subject to certain expenses connected with the whole. These are the words in plain English. How in that case the whole can be the half I do not quite understand. It might be necessary if there is anything in the context, but I do not find it. Look at Section 18.

LORD SHAND: Where do you find a passage in Article 18? Is there anything which you think is clear in your favour upon this point?

Mr. EWART: Yes.

LORD SHAND: What are the words?

Mr. EWART: There is a covenant there.

LORD HOBHOUSE: Section 18 applies to the state of things before any severance at all?

Mr. EWART: Yes.

LORD SHAND: Let us see the words.

Mr. EWART: It is a covenant by the Company that they will "faithfully use "and apply the net earnings and income to be from time to time derived from the said "division, or portion of the said railway and telegraph, or from any part thereof, after "discharging its obligations upon, or with respect to prior liens thereon, or so much of "such net earnings and income as may be necessary for that purpose to the payment of "the bonds."

LORD HOBHOUSE: It throws you back again to see what "net earnings" was.

Mr. EWART: Then we get back to this, that we have a grant of the revenue subject to working expenses of something.

LORD WATSON: In Section 18 there is no reference made to a deduction of the expenses of working.

Mr. EWART: No; it is the net earnings of that division.

LORD WATSON: I think it assumes in a previous part of the instrument that "net earnings" has been defined.

LORD DAVEY: If there is no definition of it, it is difficult to conceive that net earnings can be ascertained until it has paid all its expenses.

Mr. EWART: With reference to a railway like the Pacific Railway, 3,000 miles long, one cannot conceive that it could be quite within the policy of the Legislature to enable them to mortgage revenues of the entire division or of the Pacific division, or of the Prairie division, or of any other division.

LORD SHAND: That would imply keeping separate accounts for each.

Mr. EWART: Yes, and that is done as a matter of practice. With reference to spoiling the railway we have provisions in this deed by which the railway, in the only sense in which that word can be used, will be spoilt, that is disintegrated—it will be sold.

LORD DAVEY: When it is it ceases to be one undertaking, and the Company then has to operate what is left.

Mr. EWART: To the extent to which it may be spoilt by any of our proceedings, that is the spoiling of it. It is not spoilt by our taking possession of the 180 miles and working that 180 miles and paying our expenses before sale.

LORD HOBHOUSE: On this point we have to consider the mortgage deed, not to consider the question of public policy, and as long as the railway continues under the same one management I suppose net earnings on any given line of it imply that all the working expenses are to be taken out. The moment you step in and destroy the single management you are in a different case.

Mr. EWART: Yes; but still it is a question of what we have got under the grant. I think, with submission, it would be an extraordinary construction that under the grant would give us one thing and then, when we come to work it out, it would give us another thing. Surely we are not going under the machinery to get something greater than is given us by the grant. That is the point I desire to make. If you have a grant of something, when you are working that out incidentally and inferentially, it may be you get something greater than is given you in the grant.

The next point I wish to make is this, that there is really nothing in the language of the deed which will sanction the construction which my learned friend now seeks to put upon it. The language of the deed is that our revenue is to be subject to the working expenses of the railway. Now they propose to insert some language there, perhaps such as was suggested by Lord Davey, with reference to the decree, because the decree follows the deed.

LORD DAVEY: I do not think those words are necessary; I think that is what the declaration means.

Mr. EWART: Quite so—it would make it clear.

LORD DAVEY: If anybody says it is ambiguous I merely suggested that those words would make the meaning clear.

Mr. EWART: So I understood. The words as they stand will not bear this intermediate construction of my learned friend.

LORD SHAND: Are you talking of the Judgment?

Mr. EWART: No; of the deed at page 72. I am dealing with the words, "subject nevertheless to the working expenses of the railway." I say that means one of two things, either that our revenue is to go to pay these expenses—not in conjunction with the other revenue—there is not a word of that there. Our revenue is to go to pay the working expenses of the whole line. That is what it says. If you take the railway as meaning the entire railway——

LORD DAVEY: Not in exoneration.

Mr. EWART: Does not the deed say so?

LORD DAVEY: No, you cannot get anything until the working expenses have been paid.

Mr. EWART: Of the whole railway.

LORD SHAND: There is nothing to indicate that the profits of the whole railway are to come in on the other side of the ledger?

Mr. EWART: No.

LORD SHAND: The thing dealt with there is the revenues, rights, tolls, &c., arising from the first division of the railway.

Mr. EWART : I do not see how we get this intermediate construction. Is it in the deed ? Suppose we had a mortgage of the revenues of 10 out of 12 houses, subject to moneys for the repair of the 12.

LORD MACNAUGHTEN : Supposing there was a head rent, would it not be subject to the whole of it ?

Mr. EWART : Not if we had a mortgage of the 10.

LORD MACNAUGHTEN : Take 10 houses, the whole property being subject to a rent charge ?

LORD SHAND : Each would be subject to the whole.

Mr. EWART : It seems to me a matter of agreement between the parties. If there was a mortgage of the rents of ten houses subject to the head rent, then that head rent would come out of our revenue.

LORD MORRIS : Is that so ? If there were 12 houses subject to a head rent of £100 a year, and you mortgaged 10 subject to the payment of that £100 a year——

Mr. EWART : That £100 would come out of our revenue.

LORD DAVEY: No, it would not. You would have a right to contribution from the other two.

Mr. EWART : Why so, if that is the agreement ?

LORD DAVEY : There is nothing to say it is exclusively upon you.

LORD MORRIS : Suppose it had been a mortgage of the houses, subject to a payment of £100 a year ?

LORD DAVEY : That would not prevent your having recourse to other people.

Mr. EWART : If that was the agreement, it would—if that is all we got. It is a question of what is the agreement between the parties. Now, here there is no question of contribution, and the provisions in the deed rather negative the idea that there was to be any contribution.

LORD DAVEY : Do you impute to the Legislature or to the parties the absurd construction that the profits of this division were to pay the whole of the working expenses in relief of the others ?

Mr. EWART: Not at all. What I wish to point out is this, that that is the only alternative to our construction, and that the construction which my learned friends now take is an intermediate construction, which finds no warrant in this language.

LORD WATSON: There might be considerable expenditure upon some stations connected with this section which were entirely intended for the accomodation of through traffic.

LORD HOBHOUSE: We are arguing all this on the assumption that all the rest of the railway is a loss.

LORD DAVEY: This might be very much to the benefit of the mortgagees.

Mr. EWART: There is some reason for that assumption so far.

LORD DAVEY: The expense of this might be very much larger.

LORD WATSON: It might be very much more for his advantage to take a proportional part of the net receipts after charging the whole expenses.

LORD DAVEY: It might be a very easily worked section without any difficult gradients, and you might be able to pay a larger proportion.

LORD WATSON: It is impossible to ascertain separately, when a railway is worked as one, what the receipts are without a great deal of adjustment.

Mr. EWART: The contention previous to this, your Lordships will find in the Answer at Section 11. You will not find any warrant for this intermediate construction. The learned judges have not hit upon that, and the decree does not hit upon it. I am referring to Page 16, Section 11; "In further answer to the said Bill "of Complaint we say that if the Plaintiffs are entitled to receive any portion of the "revenues, tolls and profits of the first division of the said railway (which we deny), it "is only such portion thereof as may remain after payment of the working expenses of "the whole of the said railway and of the telegraph.

LORD WATSON: It is not a simple operation to discover what are the receipts and expenditure upon a section of the line. What are we to do with terminal charges? You may have to keep up a large staff of porters who are entirely occupied in the operation of handling goods that come through, and who would not be required in the least for that part of the line, although the receipts of the line partly come from carrying these goods.

Mr. EWART: It is really a very difficult thing, as we know, to apportion it. It would be a very difficult thing, as we have found out in connection with this railway during the Receivership, to arrive at some apportionment of revenue and expenses.

LORD WATSON: It rather appears to me that the dividing of the net receipts after charging all the expenses on the whole line against the whole line receipts, would be the simpler and certainly not less reasonable method of the two. It is not of very much consequence in this case. The question is really what are your rights to sell, and in reference to the appointment of a Receiver?

Mr. EWART: I shall have to deal with that question to some extent. We have found very great difficulty in dealing with it. It is to be determined by a great many considerations, and experts cannot give us any help in a matter of that kind. It is not divided according to mileage or to the proportion of receipts. I pass on to the question of the sale. It has been suggested that there is no personal order wanted as against the Company, that the decree therefore is not *in personam*. We could get on very well without the Company at all, if it were not necessary to have them here to constitute the suit. There are one or two regulations of a local character which I should like to call your Lordships' attention to in connection with this subject. The form of our Bill certainly does not ask that the Company should join in the Conveyance.

LORD SHAND: Nor in any proceeding necessary to effectuate a sale.

Mr. EWART: No; asking it would not be in accordance with our practice, as I will show your Lordships, and it would not appear in the decree. Under our general orders the Master would settle the Conveyance, and therefore say who were to be parties.

LORD HOBHOUSE: What is it you say is not in accordance with your practice?

Mr. EWART: That we should ask in the Bill that the Company should join in the Conveyance.

LORD SHAND: Is not the argument presented at an earlier stage. You have not asked that the Company are to be compelled to assist you to sell. The difficulty of getting a sale is that part of this is extra-territorial.

Mr. EWART: I am speaking apart from that difficulty at present.

LORD SHAND: You are speaking to another point?

Mr. EWART: Yes.

LORD HOBHOUSE: If you were to proceed under your power without the

Court, which I suppose you may do, you would not ask the Company to join, would you. It is not the custom to ask the mortgagor to join in a sale ?

Mr. EWART: Yes, in this particular case, at the time of our deed there were only 130 miles constructed ; 50 miles were constructed afterwards, and under those circumstances I think a purchaser would require the Company to be a party to the conveyance, and that the Master, in settling the conveyance, would very properly make the Company a party, because the legal estate is still outstanding in the Company as to that 50 miles.

LORD HOBHOUSE: I thought the Company conveyed the whole first division by metes and bounds.

Mr. EWART: No; there were only 130 miles built at that time, and the other 52 were constructed afterwards.

LORD HOBHOUSE: Did not they convey the land ?

Mr. EWART: No. There is a special reason why we should want the Company to join. I was endeavouring to explain the absence of any prayer in our Bill that they should join. The form of a Mortgage Bill is given in our General Orders, and the form of it is that a time may be appointed for redemption, and in default that the mortgaged premises may be sold, and the profits thereof applied in or towards the payment of the said debt and costs. It is a very short form. Then our General Order 432 provides also for a short form of decree for sale, and some words that are in Mr. Justice Killam's decree are taken from this Order, and by themselves are not nearly so comprehensive as this General Order makes them, because our General Order 432 provides: "that all necessary inquiries be made, accounts taken, costs taxed, and "proceedings had for redemption or foreclosure, or sale, as the case may be, and that "for this purpose the case is referred to the master, and that that is to include the "directions embraced in the next thirteen orders."

LORD WATSON: Is that imperative or directory merely ?

Mr. EWART: It is a form that is always used. These are the words in which we always take our mortgage decree.

LORD DAVEY: The objection against you is, not on any omission of words of that kind, it is exactly what you have said, that this a Bill for foreclosure or sale, and not for the execution of trusts.

Mr. EWART: It is a Bill, I think, partially for both ; I think it is immaterial.

LORD SHAND: You suggested that you have some clause in the regulations which says that if you present it in such a shape it shall have a wider effect than

first appears. Is there anything in your enactment which says that, given in that form, it shall be held to include something larger or different ?

Mr. EWART: I find that is the form given for foreclosure or sale, and this General Order 432 speaks of the form of the decree in that case. It is a general form. Then in one of these orders (432) the sale is to be held with the approbation of the Master, and he is to settle the conveyance to the purchaser in case the parties differ. That is the stage where, according to our practice, you would ask that the Company be made a party. If the purchaser and vendor differ as to the form of conveyance, the Master would then say whether the Company ought to be a party or not. It seems to me, in this case particularly, that the Master would almost certainly, and the purchaser would certainly, endeavour to get the Company to be made a party to this deed.

LORD HOBHOUSE: Would you allow me to ask again about this matter of title, because, as I understand, it affects your relief against the Company. You say there is part of the property not conveyed to you yet. There is still only an equitable title ?

Mr. EWART: Yes.

LORD HOBHOUSE: You would be entitled to get that, I suppose ?

Mr. EWART: Yes.

LORD HOBHOUSE: The conveyance is "of the first division or portion of the "railway extending from the point of junction with the Canadian Pacific Railway, at "Portage la Prairie, to a point distant 180 miles therefrom, measured along the track of "the said railway, as the same is now located and constructed." Do you say they had not acquired the land on which the railway is now constructed ?

Mr. EWART: No ; there is a recital that only 130 miles had been build at that time.

LORD HOBHOUSE: You do not say anything about that in your Bill, or ask for any relief, do you ?

Mr. EWART: I am just pointing out why we do not ask relief, because, according to our practice, that would not be done. That question would arise in the Master's office, between the purchaser and the vendor as to the persons to be made parties to the Bill, and it would be the purchaser that would ask that.

LORD DAVEY: They may have acquired the land then, and if they acquired the land for that 50 miles they may convey it. Where does it appear that they have not acquired the land ?

Mr. EWART: Your Lordship takes a distinction.

LORD HOBHOUSE: Of course it is, to a certain extent, a point of form, because you must have your title completed in some shape. You say that does arise in the Master's office, according to the regular course of practice?

Mr. EWART: Yes. Your Lordship sees that a part of the order says that in case the parties differ about the form of the conveyance the Master is to settle it. The parties who would differ naturally would be the vendor and purchaser, and the Master settles between those persons who are to be parties to the conveyance.

LORD DAVEY: Oh, yes, they must have had them then, if you look at the terms of the conveyance, which is: "All and singular, the first division or portion of "the railway extending from the point of junction with the Canadian Pacific Railway, "at Portage la Prairie, to a point distant 180 miles therefrom, measured along the "track of the said railway, as the same is now located and constructed."

LORD HOBHOUSE: You suggested that the line was altered?

Mr. EWART: I cannot say the line was altered.

LORD HOBHOUSE: It looks as if 180 miles were laid out at that time.

Mr. EWART: Our local information is such that it may have misled me. We know so well how it is done. You just go ahead and lay down the track wherever you like.

LORD DAVEY: Land is not of much value.

Mr. EWART: No.

LORD DAVEY: It is very open land.

Mr. EWART: Yes.

LORD MORRIS: Do the Company get a Statutory Conveyance in any way?

Mr. EWART: Afterwards they do, from the Crown or the parties.

LORD MACNAUGHTEN: When do they get it—after the railway is made?

Mr. EWART: Generally. In these outlying districts that is always the way. They lay down their road wherever they like, that is the course where there is no settlement.

LORD MORRIS: There is nothing there except wild birds?

Mr. EWART: No.

LORD MACNAUGHTEN: They get a conveyance afterwards?

Mr. EWART: Yes.

LORD MACNAUGHTEN: They have Parliamentary power to construct lines, and then they go and construct it where it will not interfere.

Mr. EWART: Yes. We certainly want the Company to join in this conveyance. As I say, we plead the covenant for further assurance, and in our Bill allege the non-construction of the 50 miles at that time. Your Lordships will find in Sections 8 and 20 of the Bill, they show the non-completion of the road at the time, and the covenant for further assurance is set out. Now, just one further remark with reference to the sale. It seems to me, discussing the question of jurisdiction, that it is rather a discussion of policy and comity, than really a question of jurisdiction. It is a question as to whether the Court will exercise or decline jurisdiction, as it is very often put. The two principal objections that might be made to it would be, in the first place that the decree would be *brutum fulmen*, and in the second place that it would be against the comity of nations that a decree should be made in this jurisdiction that would affect any other. It seems to me that neither of those presents any difficulty to us in this particular case. There can be no question that the decree in this case would not be *brutum fulmen*. That it would be perfectly effective. That if a sale is ordered we will get all we want to get; we will get a conveyance to the purchaser, and we will have the Company join in that conveyance, and the decree will be perfectly effective. Then on the ground of comity, that is out of the question, because there is no foreign court, to which, to be courteous. The Court in Manitoba might very well decline jurisdiction if there were some other Court in the foreign country having jurisdiction.

LORD MORRIS: Is not the North-West Territory a distinct province?

Mr. EWART: It is not a province, it is a territory.

LORD MORRIS: It is some place which is not under the jurisdiction of Manitoba?

Mr. EWART: Yes.

LORD MORRIS: For the purposes of this case they are foreign Courts.

LORD WATSON: To whom do the territorial revenues belong. Are they all within the Dominion?

Mr. EWART: Yes, its revenue is got from the Dominion—from the Exchequer. The lands are all vested in the Dominion, and are controlled and

administered by the Dominion. The North-West Territories have power to pass ordinances, as they are called, within a certain limited compass, and one of the rights which they have, is to set up Courts, and to pass their own Administration of Justice Act.

LORD WATSON: I thought all the Provinces were united in 1837, and that each Province had a Judiciary of its own at the time of the Union.

Mr. EWART: Yes.

LORD HOBHOUSE: There was a complete system of judicial administration, except that there was a common Court of Appeal.

LORD MORRIS: Very similar to the Courts in Ireland and Scotland.

Mr. EWART: Yes, the House of Lords here is our Supreme Court, except that our Supreme Court is not final.

LORD WATSON: India, and all Her Majesty's Colonies, are under the same jurisdiction, because they are all subject to one appeal.

Mr. EWART: What I suggest is that, although there is some of the line in the foreign jurisdiction, yet there is no Court having jurisdiction over this case, to which we have to be courteous.

LORD MORRIS: I think you said they have a power of setting up Courts.

LORD EWART: So they have.

LORD MORRIS: They have set up one. It may be a poor one.

Mr. EWART: It is a very good one, but your Lordships will see there is no Court, however good, that can deal with this case, if the Manitoba Court cannot.

LORD WATSON: In each of the provinces of Canada there is, as far as I know, a Supreme Court, which is the Court of Her Majesty, and by constitutional authority, to each Supreme Court, there has been attached a certain area within which they are entitled to exercise jurisdiction. In that respect thay are not different from any other part of Her Majesty's dominions. There is no area in Canada in which the Courts of two different provinces exercise a concurrent jurisdiction.

Mr. EWART: No doubt they are distinct jurisdictions.

LORD SHAND: If you wanted a decree of the sale of the nine miles, and you could get it, what would be the Court that would give you that?

Mr. EWART: The Supreme Court of the North-West Territory.

LORD SHAND: You have no other Court you could go to?

Mr. EWART: The Supreme Court there. They have jurisdiction to sell the line.

LORD HOBHOUSE: The sale of two fragments would not be like the sale of the whole?

LORD SHAND: You would be met with the same objection.

LORD WATSON: You would not dispute that this was in actual possession, and for removing a possession it would be necessary to go to the North-West Territory.

Mr. EWART: The venue might be local.

LORD MORRIS: How would they call upon the police or the sheriff, or whoever gives possession? How could the Court of Manitoba order the Sheriff of the North-West Territories to do that?

LORD DAVEY: He would go to one sheriff for the 120 miles, and to the other for the remainder.

Mr. EWART: If we have a sale and a conveyance, then if we cannot get possession of the nine miles otherwise, we would get it under the conveyance which would be executed in Manitoba. On that conveyance we should go to the North West Territories and show our title to the nine miles, and in that way get possession, if any difficulty arose.

LORD HOBHOUSE: You mean the purchaser would?

Mr. EWART: Yes, the purchaser under the conveyance. In that way one would be ancillary to the other. I wish to make one remark with reference to selling out of Court. There is one consideration that is important there. One understands there are not many purchasers for a railway, and one of the securities that we wish to have when the property is put up would be the right to bid. It would be very essential that we should have that right. That is one of the reasons why we want the sale conducted by the Court. If it were a sale under the power of course we could

not bid, but in a sale conducted by the Court, even a mortgagee, with leave of the Court, can bid, and much more could beneficiaries.

LORD SHAND: Such right would have to be guarded by making a certain fixed upset price.

Mr. EWART: The conduct of the sale would, according to our practice, be given to an indifferent party. We should not have the conduct of it if we got leave to bid. In that way we could protect our security, and make something out of it.

LORD DAVEY: It is perfectly intelligible. It shows that what you want is a judicial sale.

Mr. EWART: Yes, we do want that.

LORD WATSON: If it is not competent to the Court to order a judicial sale, it is difficult to see how Section 1 can be sold as one lot without the concurrence of the two Courts.

Mr. EWART: In conclusion we have to ask your Lordships to decide the question as to revenue after a sale, even if your Lordships do not think that a sale ought to be ordered.

LORD SHAND: A sale without a power of that kind would not be of value to you.

Mr. EWART: Without a declaration of our rights it would be of very little value.

LORD SHAND: I mean without a power of bidding.

Mr. EWART: It would probably be of little use to us. We should probably have to organize a purchasing section in order to protect our security.

LORD SHAND: You would rather have an order for sale with that if you cannot get it without.

Mr. EWART: Yes; because if we have to sell ourselves we cannot bid; the question of leave to bid would not trouble your Lordships, because that is reserved in the decree. We should ask your Lordships to reserve in the decree a right for us to apply, in the language of Mr. Justice Killam's original decree for leave to bid.

Then I ask your Lordships to decide this question of revenue, even if no sale is ordered, because it will throw us to exercise the power, and without any assistance from the Court. That question was sufficiently argued in the Courts below, and your

Lordships will see commented upon by the Chief Justice adversely to us. He made no difference between before and after sale ; only his language is modified in the decree ; his judgment is that our bonds are subject to the working expenses. He does not distinguish the revenue from the property.

LORD DAVEY : Do you think the Chief Justice means that that charge would continue after a sale in the hands of purchaser ?

Mr. EWART : I think he had overlooked the distinction. With all the argument very fully before him, I am sure he has overlooked it, because he says, " the " decree may contain a declaration that the working expenses of the entire railway are " a charge in priority to the bonds."

LORD DAVEY : He says that in connection with the Receiver, or he may have been only thinking of it as a direction to the Receiver.

Mr. EWART : I rather think not, because he introduces the whole subject by asking the question apart from the Receivership ; " There still remains a question " with regard to the expenses of the railway. Are the working expenses of the entire " railway entitled to priority in order of payment over the bonds."

LORD DAVEY : That may mean *rebus sic stantibus* while it is being worked by the railway company.

Mr. EWART : It may be, but I think he had forgotten.

LORD DAVEY : You think his mind was not addressed to the distinction ?

Mr. EWART : Yes.

LORD HOBHOUSE : He seems to me to be speaking quite generally, at all events the saving clause in the decree does not take any notice of the fact of entry.

Mr. EWART : No. Then the decree comes out in that way ; what troubles me principally is this, that the decree is somewhat ambiguous and it would be construed by his Lordship's Judgment, and being construed by his Lordship's Judgment, is destructive of our whole security.

ARGUMENTS FOR RESPONDENTS.

Mr. ROBINSON : I think perhaps I will first say what little I have to say with regard to the question of working expenses. As I understood my learned friend, Mr. Blake, he attributed to us the contention that this section was burdened exclusively with the entire working expenses of the whole road. All I can say about that is this :

I know nothing of the case in its earlier stages. It is not a position which I myself should have thought for one moment tenable. That in point of fact, as I understand it, would be to say that there were to be no working expenses on the whole of the rest of the road ; in other words, that this division was to bear all the working expenses.

LORD SHAND : To bear them all in the first instance, you know. There might be a balance to come upon the other. How would you state the account ?

Mr. ROBINSON : I think I can explain what I should do. I should first get the whole of the gross revenue of the whole road. I should then deduct from that the working expenses of the whole road, and by that process I should get the net revenue. I should then ascertain how much of that net revenue should properly bo appropriated to this division. As to the mode in which it should be apportioned, and the mode of getting at it, we know that it is a question of great complication, in some cases only to be ascertained by experts—by accountants.

LORD DAVEY: Depending very much on the particular circumstances of the case.

Mr. ROBINSON : Wholly.

LORD SHAND : What you suggest strikes one as a reasonable way of doing it. I think the decree is not very happily expressed here.

LORD HOBHOUSE : You are speaking now of the continuance of the management in the old hands.

Mr. ROBINSON : Yes.

LORD SHAND : And assuming that there has been a Receiver appointed ?

Mr. ROBINSON : I do not think it would make much difference whether a Receiver was appointed. You may assume that a Receiver is appointed.

LORD HOBHOUSE : I do not know what the Plaintiffs gain by their Receiver, as long as the management is the same, except the payment of a bill of costs, and delay.

LORD SHAND : There was a Receiver appointed, and that is not appealed against.

Mr. ROBINSON : No; with regard to the mode of apportionment there are simple cases, very exceptional I think, in which mileage might be a proper way of doing it. Those would be very exceptional indeed. You would have to consider

terminal expenses and the requirements of through traffic. The other contention which my learned friend attributed to us seems to me to be disposed of at once by a suggestion which was made. Supposing this road had been mortgaged under a form like this in several sections, according to that contention, if each had a decree, each section would have had to pay the working expenses of the whole road. That of course is altogether out of the question. There never could be any such arrangement. I do not myself see the difficulty either in saying what is equitable, or in saying how it is to be arrived at. Now, it is desirable to consider the Statute for a few moments. We have first to consider what it is that the Statute authorized, and next what is it that the mortgage under the authority of the Statute says and provides for. I refer now to page 24 of the Collection of Acts. The Statute says: "But notwithstanding anything in "this Act contained, the Company may secure the bonds to be issued by them by mort- "gage deed, creating such mortgages, liens and encumbrances upon the whole or any "part of such property, assets and revenues of the Company, present or future, or both, "as shall be described in the said deed; but such revenue shall be pledged in the first "instance to the payment of the working expenses of the railway." Now, there can be no question, I suppose, that that is a distinct statutory declaration that the whole revenue of the road shall be pledged to the working expenses of the whole road. I understand that to be a principle affirmed by the Legislature, and to be universally and absolutely essential to the necessities of the public in keeping up such roads as are authorised by the Legislature and built under their sanction. The whole railway, and every part of it, is subject to the working expenses of the whole railway and every part of it. If you wish to ascertain what proportion of those working expenses any par- ticular section must bear, you do it by the method we have said. I do not think it could be of use to your Lordships to go at length into that. We have first the statutory declaration. Now, the Courts have said that if this mortgage made any other provision than that it would be a mortgage not authorised by the Statute. I venture to submit that that is so. The mortgage can, of course, only be given under the authority of the Statute, and it must conform to the terms of the Statute, and whatever mortgage is given it cannot disturb the statutory declaration that the whole of the revenue of the road shall be subject to the working expenses of the whole road.

Then we come to the mortgage that was given under the authority of that Statute, which we find at page 65. After several recitals, we have at page 66 a recital that, by a certain indenture, "The railway of the Company extending from Portage la "Prairie, in the Province of Manitoba, to Prince Albert, in the North-West Territory "of Canada, being an estimated distance of 430 miles," was conveyed. There we have a description of the railway of the Company, in other words, of the railway the working expenses of which are charged on the whole of it by the Statute, that that is a railway extending 430 miles. Then you go on to the granting part, and you grant the first division, and you turn over to page 72 till you come to the revenues. You grant also "all revenues"—in point of fact, all the income "profits and sums of money arising or "to arise from the use of the said first division or portion of the said railway "or telegraph or of the property hereby conveyed, or any part thereof, "subject nevertheless to the working expenses of the said railway and telegraph." Now, there you have, in close contrast, the first division and the railway constructed with each other. You grant the revenues to arise from the use of the first division subject nevertheless to the working expenses, not of the first division, but of "the said "railway," which has been previously described as a railway of 430 miles—"and to all "rates, taxes, and assessments, and other Government charges."

LORD WATSON: If that be the construction which you put, it follows that the first step to be taken is to ascertain what are what I may term the free earnings of the whole line, and then to determine what proportion of those free earnings of the total line are fairly to be appropriated to the one portion.

Mr. ROBINSON: Yes, Then it was said that the Decree was not happily expressed.

LORD WATSON: If I correctly construe the Order of the Superior Court—the Court of Appeal—that is precisely what they do. According to my view, they have not ordered that all the expenditure on the other sections shall come out of the profits of Section No. 1.

Mr. ROBINSON: Not in any way, as I understand it.

LORD WATSON: The profits on Section No. 1 are to be paid over to the Receiver. There are to be taken into account the receipts of the whole line.

Mr. ROBINSON: As I understand the Decree it follows the Statute. It expresses exactly what was intended to be expressed, and it expresses the law.

LORD WATSON: I think that is a rule so long as the Company are working the whole line under an obligation to pay the receipts of Section No. 1, either to the Mortgagees or their Trustees, or to the Receiver. Does that arrangement with regard to ascertained profits apply in either of the two cases where the Trustees and Mortgagees have entered into possession of the one, or where if Section 1 were sold in pursuance of the power given?

Mr. ROBINSON: Those two questions are very different questions indeed.

LORD WATSON: Do you maintain that the same rule would obtain.

Mr. ROBINSON: I do maintain that. I only wish to point out (and then I shall have done with that branch) that I think the decree is not properly expressed. There are one or two words left out. What is printed is not English. I think you must insert the word "by" in the first line and strike out "of" in the third, but practically it says at Page 40: "That by the Mortgage by the Defendant Company to "the Plaintiff, referred to in the Bill of Complaint herein, the revenues, freights, tolls, "incomes, rents, issues and profits of the 1st division of the Defendant Company's "railway and telegraph were mortgaged to the Plaintiffs, subject to the payment in "priority to the said Mortgage of the working expenses of the Defendant Company's "entire railway and telegraph." As I understand, that is strictly accurate. They are subject, but they are not exclusively subject.

LORD WATSON: It does not necessarily follow that the whole should pay.

Mr. ROBINSON: No, it is true to say that the revenues of this division are subject to the working expenses of the whole.

LORD HOBHOUSE: Is it perfectly true to say we ought to stop there?

Mr. ROBINSON: Yes, because it does not say exclusively.

LORD HOBHOUSE: When there are other provisions for severance and making a complete alteration in the distribution of the expenses.

Mr. ROBINSON: I should have said so.

LORD HOBHOUSE: It seems to me to prejudice the case very much indeed.

LORD SHAND: I suppose you would say that it is a good enough direction in a case where the sale has been refused. My objection to it rather was that it looked as if it were subject in a broader sense, but as you have explained it I am satisfied. If it means subject along with the rest of the railway line to the payment, that ought to be quite a reasonable arrangement.

LORD WATSON: The words are used once or twice, which do not imply hat the whole of the receipts of the line are to be taken into estimate.

LORD HOBHOUSE: It applies in terms to the whole security. I should object very much to being one of the Mortgagees. Whether I should be right in objecting would be another matter, but I should consider myself seriously prejudiced by it.

LORD SHAND: Taking it with reference to what Lord Hobhouse says it follows Article 1, which begins by saying: "The Court doth decree that the former "decree be reversed in so far as it directs a sale of any portion thereof" dealing with the case as one in which we have refused a sale—and then follows the other directions.

LORD HOBHOUSE: It takes no notice of the power of entry.

Mr. ROBINSON: Because they have refused the power of entry.

LORD WATSON: The Order is: "And the said receiver is hereby declared "to be and since his appointment to have been Receiver of so much of the revenues, "freight, tolls, incomes, rents, issues, and profits of the Defendant Company's railway "and telegraph as may be applicable to the first division of the Company's railway and "telegraph, subject to and after the payment of the working expenses of the said "Defendant Company's entire railway and telegraph." That is putting on one side the entire receipts.

LORD DAVEY: It would be only a direction to the Receiver.

Mr. ROBINSON: Well, then, taking that as simply a direction to the Receiver, it seems to me to be strictly accurate.

LORD WATSON: The words are, "so much of the receipts." I think that necessarily means the receipts of the whole line "as are applicable to the first division." That suggests that they are dealing with and apportioning a fund which has application to more than the first division.

Mr. ROBINSON: In other words, you can have no revenues to mortgage at all until the working expenses of the whole are provided. All that you have power to deal with are the surplus revenues of the road after providing for the sale of the whole.

LORD MORRIS: Does not paragraph 2, page 40, declare substantially, not only a mere order for a Receiver, but that under no state of facts can the Mortgage of the Defendant Company to the Plaintiff be anything more than of the revenues subject to the payment of the expenses of the whole railway?

LORD WATSON: That may be consistent with the view that the assignation of such profits will become absolutely inapplicable after the principal subject given in security has been sold.

Mr. ROBINSON: I am not driven, in discussing this, to the question of what would be the rights as regards the working expenses after sale.

LORD SHAND: I read that second paragraph as meaning that they have refused a sale.

LORD WATSON: I do not think they have laid down the rights of the parties.

LORD SHAND: No, there is not a suggestion. It does not arise.

Mr. ROBINSON: Then the next question is as to the rights after sale.

LORD MORRIS: Or after entry.

Mr. ROBINSON: After entry is not, I think, in question at all.

[Adjourned to to-morrow at 10.30.]

The foregoing is a correct transcript of our Shorthand Notes.

(*Signed*) MARTEN, MEREDITH & HENDERSON,

13, New Inn, London, W.C.

In the Privy Council.

GREY

v.

THE MANITOBA & NORTH WESTERN RAILWAY COMPANY OF CANADA.

COUNCIL CHAMBER, WHITEHALL,

12*th February*, 1897.

PRESENT—

The Right Honourable Lord WATSON,
The Right Honourable Lord HOBHOUSE,
The Right Honourable Lord MACNAGHTEN,
The Right Honourable Lord MORRIS,
The Right Honourable Lord SHAND,
The Right Honourable Lord DAVEY.

(Transcript of the Shorthand Notes of Messrs. Marten, Meredith and Henderson, 13, New Inn, Strand, London, W.C.)

[THIRD DAY.]

Mr. ROBINSON: My Lords, I have said what occurred to me to say with regard to the question of working expenses before sale. It is a matter, of course, upon which one could speak much longer, and elaborate very much more; but as far as I can judge it seems so clear to ourselves and so clear in the minds of several of the Board that it will probably be waste of time further to discuss that question.

LORD HOBHOUSE: Do you mean as to the jurisdiction of the Court?

Mr. ROBINSON: No; the question of the liability to the working expenses before sale. We have never for a moment taken the position attributed to us. It seems to me the position we do take is so plain to the Court, as it was to us, that I should waste time by discussing it at greater length.

Then, my learned friend urged upon the Court to decide what would be the obligation as regards working expenses supposing the Trustees had taken possession, or supposing there had been a sale. We respectfully object to discuss that question;

we say it never has been raised. The Courts below have distinctly refused to express any opinion upon it, and we have not come here prepared to argue that question. I have heard of that question for the first time since I came here. There is nothing in the Appellants' case to suggest it. There is nothing anywhere to suggest it; there is no such prayer.

LORD WATSON: The Court naturally did not address themselves to that point at all.

Mr. ROBINSON: No.

LORD WATSON: I think practically they have decided that a deduction is to be made from the receipts of the whole expenses of operating the railway and connected with the railway so long as those receipts are collected by the Company, and the same rule applies after the appointment of a Receiver whose duty it is simply to receive these payments from the Company.

LORD SHAND: Supposing the Board were to take a different view and there was an Order given which would ultimately result in a sale, or which might result in a sale, what then?

Mr. ROBINSON: My view of that is, that what would be sold is what they take under the mortgage.

LORD HOBHOUSE: Do you say the Plaintiffs have not a right to have the contract construed so that they may know what they have to offer for sale?

Mr. ROBINSON: I say they have not made any case for that.

LORD MORRIS: It is involved in the first question which you say is so plain, because there are articles in the mortgage which go to show that after a sale the working expenses of the entire railway would not be deducted because the portion taken possession of would become a sort of entity in itself. In deciding the first question there has to be a contrast drawn between the two; in fact Mr. Blake relied upon those articles in the mortgage as giving a construction so that it becomes necessary, if not to decide, at all events to refer to it, and show the difference.

LORD WATSON: The finding of the Appeal Court does not in the least degree imply that that expenditure is to burden the receipts of the section after it is sold. He expressly reserved the point: "But this Court does not see fit at the "present to declare the rights of any parties in respect of such priorities after any "sale of the first division of the railway."

LORD HOBHOUSE: The first part of the decree is very unhappily expressed; I should not like it at all if I were a bondholder.

LORD SHAND: That is one of the things appealed against, that the Court did not do this, that the Court reserved that. Your opponents ask for such a construction as will go further than what the Court have done. If they raise the argument you seem to be called upon to meet it, unless you choose to leave it upon this. Supposing the Court do think it desirable to have some declaration of that kind are we to be deprived of any argument you can offer us on that subject.

Mr. ROBINSON: In the first place we regard it as a question not likely to arise. At present the sale has been refused.

LORD WATSON: The contention of the Appellants in the Court below was that they were entitled to the sale ordered by the Court, and that the subject sold was to be Section 1, free from any incumbrance of the expenditure. The Court found it unnecessary to divide it. That was a finding which in its terms plainly implies that the Court had been asked to consider the point.

Mr. ROBINSON: I believe what took place was that that was suggested, and the Court was asked to declare it. It was said on our side in the Court below that the question had been raised, and we declined to argue it.

LORD WATSON: We cannot assume that the Court went through an idle form.

Mr. ROBINSON: I can only say for myself that I heard that question for the first time, as likely to be argued here. I looked with interest, as one always does, at the Appellant's case, to see what questions they presented.

LORD SHAND: The case would certainly be in a different position if this Board were of opinion that the result of an order would be that there would be a sale, at all events, that there would be a power of going on to sell. If that once arises, surely you are then thrown on anything you have to say on that subject by way of defence.

Mr. ROBINSON: Our view is that the order for sale would be to sell what the Mortgagees took under their mortgage.

LORD MORRIS: We are not entitled to control what they take under the mortgage.

LORD HOBHOUSE: Without giving the slightest assistance to them, so that the purchaser might know what he was buying.

LORD MACNAGHTEN: Do you think they ought to sell something with a law suit attached to it?

Mr. ROBINSON: Not necessarily a law suit; but there are many cases in

which, after property is bought, the question arises as to the liability of those who hold it; it is not always declared in advance by the Court.

LORD WATSON: I suppose that would mean that the order for sale would come up again on appeal here.

LORD HOBHOUSE: Do you think anybody would buy a most formidable law suit?

Mr. ROBINSON: Possibly there might be a lawsuit.

LORD HOBHOUSE: Of course, nobody would bid.

Mr. ROBINSON: They are placed at this disadvantage——

LORD MACNAGHTEN: I do not see the disadvantage. The whole thing arises on the construction of a written instrument, which you have had to read many times.

LORD HOBHOUSE: You know it all by heart.

Mr. ROBINSON: I have no excuse to make on that ground.

LORD SHAND: It is a question of construction entirely.

Mr. ROBINSON: I have merely to say that that is a matter which I have never considered until we came here.

LORD DAVEY: Have not you had ample time to hear Mr. Blake's argument?

Mr. ROBINSON: Yes. If it is the desire of the Court I shall say what occurs to me upon it with pleasure. I can only explain to the Court why we have not considered it, and why we do not desire to argue it, and do not think it arises or ever will arise.

LORD SHAND: Your adversary suggests that you rather shrink from arguing it.

Mr. ROBINSON: If your Lordships ask me that, I do shrink from arguing anything I have not had an opportunity of properly considering.

LORD DAVEY: The 4th and 5th Reasons of the Appellants surely raise the question.

Mr. ROBINSON: I read that case last night with reference to this particular question. They say: "Because upon the true construction of the trust deed of 16th "of April, 1886, and of the Special Acts relating to the Respondent Company's rail- "way, and particularly upon the true construction of Section 4 of the Special Act of "1886, the mortgage to the Appellants is only subject to a prior charge of the working "expenses of the first division of the Respondent Company's railway, and of all rates, "taxes, assessments, and to the Government charges charged thereon." I read that as merely an assertion of what the liability is at present, not as to what it might be under a different state of circumstances if a sale had been ordered and taken place.

LORD DAVEY: Look at Reason 5.

Mr. ROBINSON: That I understand merely to be an argument for the first construction. I am explaining how it struck me:—"Because of the said first division "is ordered to be sold by the Court, any other construction than the above of the "said trust deed and Special Acts would be to render the said first division practically "unsaleable, burdened with the upkeep of the other portions of the Respondent "Company's railway, and of any extensions of the same under the present powers of "the Respondent Company." I do not read that, whether right or wrong, as raising this question. I read it in connection (and I may have been misled by that) with the first part of the case, in which they say:—"The questions to be determined on this "Appeal are as follows, namely: (1) Whether the Appellants as mortgagees are entitled "to have a sale of the whole of the first division of the Respondent Company's rail- "way and telegraph. (2) Whether, if the Appellants are not entitled to have a sale "of the whole of the first division, they are entitled to have a sale of that portion of "the first division (being about 170½ miles), which is wholly situated within the "Province of Manitoba. (3) Whether the mortgage of the first division of the Respon- "dent Company's railway and telegraph to the Appellants is subject to the payment "in priority of the working expenses of the entire line of railway worked and owned "by the Respondents (inclusive of the first division), and of all rates, taxes, assess- "ments, and other government charges charged thereon, or only of the working "expenses of the said first division and the rates, taxes, assessments, and other "government charges charged thereon." I thought that plainly pointed to this liability at present.

LORD WATSON: That puts the question very fairly and in terms.

Mr. ROBINSON: With regard then to the question of what would be the liability to working expenses after sale, or after the Trustees had taken possession, I have this to say: I should gather from the intimations of opinion that have fallen from several of your Lordships that they think it would not then be liable.

LORD WATSON: There is nothing said as to the charge upon these receipts.

LORD SHAND: What strikes me about it is that *ex necessitate rei* they have nothing to do with the rest of the line and their working it with the rest of the line. I have a difficulty in seeing how you could have the expenses of somebody else's line.

Mr. ROBINSON : Until the difficulties were suggested they had not occurred to me. It seemed to me to stand in this way. The policy of the law, as I understand it, with regard to railways is that the whole and every part of a railway shall be subject to the whole of the working expenses of the whole and every part.

LORD WATSON : These are the receipts of which they stand possessed, and the deductions are to be made before they hand over the receipts or a proportion of them referring to Section No. 1, but after the sale they contemplate a state of matters which entirely changes the position.

Mr. ROBINSON : I have always seen that difficulty. I have seen what has already occurred to me to be a greater difficulty. I do not believe that our Legislature ever intended or ever enacted that any part of a railway should ever be operated in the hands of anyone without being charged with its due proportion of the working expenses of the whole.

LORD DAVEY : But it ceases to be part of the railway.

LORD SHAND : It becomes itself a whole.

LORD MORRIS : The Legislature must take very unjust views.

Mr. ROBINSON : With deference I do not think they do ; I think when they authorize a railway as a whole undertaking they have never contemplated any part of that being relieved from the charge of the working expenses.

LORD MORRIS : Then they never contemplated any part being sold ?

LORD DAVEY : They cease to be your revenues.

LORD SHAND : The result would be to put great pressure on the Railway Company to try and meet its obligations if it does not want to face this result.

Mr. ROBINSON : I cannot myself see the great difficulty. It comes to the bondholders, subject to the charge of its fair proportion of the working expenses of the whole railway. When it is sold they take title in that respect through the bondholders. Why should it come into their hands free from a charge which was upon it in the hands of the purchaser ?

LORD WATSON : What is to be sold is Section 1.

LORD MORRIS : And the right to its revenue.

Mr. ROBINSON : The obvious result would be to break up the whole of any railway.

LORD MORRIS: I can understand the policy of not allowing any part of the railway to be sold; there is a great deal in that, and I was struck with that, but once you do sell a portion of it I do not understand how the purchaser of that is to get his revenue subject to the expenses, but that he has to pay the expenses of another line of which he gets none of the revenue.

LORD SHAND: After all, it is what happens on almost every line in the country. You have a certain section belonging to one company and the adjoining section to the other, and when they are in that posttion both parties are bound to make the best arrangements they can.

Mr. ROBINSON: Yes. These are not companies which have been chartered as a whole undertaking together. That is just the distinction.

LORD WATSON: There is this difference, that in this country they would have to go to the Railway Commissioners.

LORD DAVEY: It is an excellent reason for saying that the section of a railway should never be sold, but that is past praying for, is it not?

Mr. ROBINSON: I do not think it is past praying for that this section could never be sold. I do think it is past praying for that no section could under any circumstances ever be sold.

LORD MACNAGHTEN: Under what circumstances do you apply that? It is not to be sold if there is attached to it a non-productive portion of the line?

Mr. ROBINSON: There may be cases in which a section may be sold. My argument is that when it is sold it is sold with that charge upon it, just as it existed before it was sold, and that the fact that it is in different hands makes no difference; I say no difference speaking with the greatest possible diffidence. I see no difficulty in a purchaser taking this with a charge upon it just as he would take any other property with a charge upon it.

LORD WATSON: There is this great difficulty, that in order to satisfy to the letter, the stipulations in regard to the payment so long as the whole line is in the hands of the Company, you require to make up an account of the whole line, receipts and expenditure, and you would have to bring in, not only the receipts of the separate Company who acquired the first section, but the expenditure on that section. Throughout that clause of the mortgage it deals with the whole receipts, and the whole expenditure.

LORD DAVEY: Suppose the balance were the other way, and the purchaser had to demand something of the Company.

LORD WATSON: The result would be that, in point of fact you would have to make a deduction, on what principle it is difficult to see; you would have to make a

deduction of the expenditure upon Section 1 from the receipts of the remainder of the line.

Mr. ROBINSON: Of course there is no more difficulty in doing it when you have got the figures. There is no more difficulty in ascertaining its proper proportion to the working expenses.

LORD HOBHOUSE: This charge which you contemplate as being on the railway in the hands of the purchaser is a varying charge from year to year, at the option of people over whom the purchaser has no control whatever?

Mr. ROBINSON: It is.

LORD HOBHOUSE: There may be any amount of expense. Who would purchase the property under those conditions?

Mr. ROBINSON: I do not know who will ever purchase the section of a railway under any conditions. I should say nobody would be such a fool. I am speaking now not in point of law.

LORD SHAND: A man would be a fool if he bought it under such conditions as you propose to annex to it. But if he is free of those conditions, he is getting a separate property which he can work like the proprietors of any railway in this country.

LORD WATSON: If they renew all their stations on the other parts of the line they might for years swamp the receipts of the section sold.

Mr. ROBINSON: All that has to be taken into consideration.

LORD HOBHOUSE: I suppose this would be put up with an upset price, being the amount of the bonds, and probably it would be purchased by somebody in the interests of the Bondholders for the amount of the bonds. I suppose so, but I do not know. As for the arrangements of the rest of the Company, that seems to me to be left by the Act in the discretion of the Minister who grants the licences, and then of the Parliament whose authority is necessary to give the purchaser full powers.

Mr. ROBINSON: All this is left in the hands of the Minister. That any Minister or Government will ever sanction the running of any section of a railway, without seeing that it does pay its due proportion of the working expenses of the whole, I do not believe.

LORD HOBHOUSE: That may be so. We have only to construe the contract.

LORD SHAND : I suppose among other powers, probably a Minister of railways, dealing with a matter of this kind, would give running powers as between railways ; and that is happening every day in this country.

Mr. ROBINSON : I think the first thing a Minister would do would be to see to the security of the operation of the whole line which the Legislature authorised. I think my error, and it would seem plainly to be an error, has arisen from thinking more of the circumstances of the country in which the railways exist, and the circumstances of any other railways of the same kind, than others have thought. Our railways are not like railways here. They are not commercial undertakings at all: that is to say—few or none of them are expected to pay on their merits. They are undertakings aided by the Government by large grants of public money and of land.

LORD MACNAGHTEN : I suppose they are expected to pay their Bondholders ? They hold out hopes to their Bondholders.

Mr. ROBINSON : No doubt, but I think the hopes of the Bondholders would be decidedly greater in the view that I suggest that the whole railway is to be kept alive rather than if any part stops.

LORD WATSON : A power is given to sell and dispose of the first division:— " All and singular property rights and franchises hereinbefore expressed to be con- " veyed and which shall be then subject to the lien of these presents either separately " or in conjunction with the owners for the time being of the remaining portion of the " side line." Do you think there is any lien constituted by this, any lien constituted over the receipts of section No. 1 ? The lien there refers to the *corpus* ; it refers to the preferable charges, which are to remain preferable. This is really saying that there is constituted after a sale a lien of charge upon the receipts of Section 1. I cannot find any trace of that. It is not made a lien in any sense of the term. It is simply the payment of the expenses ; it simply made a deduction from the receipts giving into the hands of the company.

Mr. ROBINSON : In other words it is only the surplus revenue. There are no revenues of a railway company until the working expenses are deducted. I suppose I am wrong from being so strongly impressed with the obvious policy as appearing in the statutes. This railway, for example, has about a million acres of land granted to it out of the public Domain as a subsidy. As the documents and statutes before you show they had advanced to them by the Province of Manitoba $700,000 or $800,000—I am satisfied that it was never intended by the Legislature when they authorised the sale of a section of a railway ever to relieve that section from its due proportion of the payments of the working expenses of the whole so that the whole should be kept up.

LORD SHAND : I do not see your answer to the observation that the owners of the other part of the line might proceed to swamp and destroy the whole of the articles sold. I think that is an evil that you would have to face in your construction.

LORD DAVEY : When you come to it will you discuss the construction of Article 2 ? Do not let me interrupt you.

Mr. ROBINSON : I see that my argument finds no sympathy with your Lordships.

LORD MORRIS : There certainly would be no sympathy with it.

LORD SHAND : I do not think sympathy would assist.

Mr. ROBINSON : No ; I do not mean in that sense. I mean it does not carry your Lordships minds with it.

LORD WATSON : What I fail to find within the four corners of this instrument is any words making the expenditure on the rest of the line a charge upon the receipts of Section 1 after a sale.

Mr. ROBINSON : My only answer to that is, it is a mortgage of something which is subject to that charge and which is not relieved from it.

LORD WATSON : It is not a charge upon the line.

Mr. ROBINSON : No ; it is a charge upon the revenues, upon the receipts. That charge, in our submission, continues throughout ; it is charged in the hands of the Bondholders ; it is charged in those who take through the Bondholders, and it is necessary that it should be so, in order to secure the benefit which was intended for the public when the line was authorised and built and opened. The result of the other construction would be almost to break up these lines. I quite agree with the force of what my learned friend has said. All that may possibly be cured by the Government. When you buy you cannot operate without going to the Government ; and they, I have no doubt would make such stipulations and conditions, and, I think, would equitably and properly make them, as would insure the keeping open of the whole line. So much, my Lords, for the question of sale.

Then my learned friend has asked your Lordships to declare what would be the rights of the Trustees themselves, or the obligations of the Trustees themselves, if they had taken possession of this line and were operating it under the power to take possession contained in the instrument. That I venture to suggest is even more strongly a question not open for discussion, for this reason, when a Receiver was appointed it was, as I understand the practice, necessary, he being in possession and appointed by the Court, to obtain the leave of the Court before any proceedings were taken to interfere with his possession. They came to the Court by petition, as your Lordships will see, the petition being set out in our Answer. It begins at page 17. After setting out the facts—which I need not repeat—the fact of the incorporation of the railway, of the mortgage, and the different classes of mortgage which they thought material——

LORD WATSON: What they have a right to do in the event of their entering into possession, and what the obligation is for them to do, on entering into possession, is very fully, and very distinctly defined in Article 2. We cannot go beyond the terms of that. They are entitled under Section 1 to receive all tolls, etc., and the income arising, and they are bound to apply the money to payment of interest on the bonds, which is all a stipulation in favour of the debtor in the bond, the Company; and what they are entitled to deduct before making payment of this is thus specified. They are first to deduct the expenses of operating the said division or portion of the said railway—there is no reference made to any other part of the line—"And conducting the "business thereof, and of all the said repairs, replacements, alterations, conditions and "improvements, and all payments which may be made, or may be due for taxes, assess- "ments, charges or liens prior to the lien of these presents," that is to say the creditors having a lien preferable to the bondholders.

Mr. ROBINSON: Yes; if that clause comes into operation.

LORD WATSON: That does not make any provision for payment of expenses.

LORD SHAND: Mr. Robinson is submitting that you cannot get at that question, that he is entitled to exclude it.

Mr. ROBINSON: That is what I am discussing now, entirely.

LORD WATSON: It may not be immaterial to consider the whole deed—the stipulations with regard to possession as well as the stipulations with regard to sale.

Mr. ROBINSON: Yes, but I am now discussing the question of whether this is open.

LORD WATSON: The stipulation with regard to entering into possession and entering into sale differ in this respect from the stipulations with regard to payments to be annually made by the Company that is in possession of the whole line.

Mr. ROBINSON: When we have to discuss that there are things to be pointed out. What I want first to call attention to is the question whether this is open. They had to get the leave of the Court before they could take any proceedings. The prayer for relief is "That leave may be granted to them to take such proceedings in "this Honourable Court as they may be advised for enforcing their rights to enter "upon possession of the said first division or 180 miles of railway." They were refused that leave and they never appealed from that refusal.

LORD HOBHOUSE: Do you mean to say that they are shut out altogether?

Mr. ROBINSON: Yes; they are shut out altogether here. Upon that they were refused leave to proceed.

LORD MORRIS : I thought theee applications were simply because when property is in the custody and control of the Court it would be a contempt of the Court to take any proceedings without its permission, but I thought the permission was always given as a matter of fact.

Mr. ROBINSON : No ; there are good grounds here for refusal, as I think I shall be able to show your Lordships.

LORD HOBHOUSE : It is merely because the Court's Receiver was in possession that leave was required.

Mr. ROBINSON : However, as a matter of fact, in a considered judgment of the full Court leave was distinctly refused to take these proceedings.

LORD SHAND : Supposing the other party were now to ask leave to appeal upon that point, if there were any difficulty upon that, why should you not deal with that when you are all here?

LORD HOBHOUSE : If it is necessary to appeal from this Order, I should have thought it an absolute matter of course to grant it.

Mr. ROBINSON : We have first to see what leave did they ask for, what leave did they get, and what did they do upon that leave ? Then we come to the Bill which they filed upon the leave which they obtained, and in that Bill all that they ask is that the property described may be sold under the direction of the Court.

LORD HOBHOUSE : I cannot help thinking in the earlier proceedings, and even in Mr. Justice Killam's judgment, it was conceived that the appointment of a Receiver had the same effect as an entry and operation. It seems to me to have mixed up the two things. Mr. Justice Killam, I think, certainly does, and I suspect they did in all these earlier proceedings. They had not observed the difference.

Mr. ROBINSON : One of your Lordships asked upon what ground did they refuse that. I have here the Manitoba Reports, Volume 10, page 121, where we find the Judgment of Mr. Justice Killam. He says :—"The various Acts relating to the "Defendant Company to which reference has been made do not appear to me to have " the effect of ratifying by legislation any provisions of the mortgage providing for " possession by the morgagees or foreclosure. Those Acts seem only to have been " intended, in their effect upon the mortgage and the debentures, to declare and " preserve their priority, and the charges created by them." That is a matter which may require discussion hereafter. " In my opinion, then, the petitioners are not " entitled to possession of the railway, or the appointment of a manager, or to fore- " closure of the mortgage, and they should not now be given leave to bring any suit " to raise again any question of their rights in these respects." That was in effect the Judgment of the full Court. They declined to give that leave. They asked for leave to proceed for foreclosure, or for the right to enter into possession, and for sale.

LORD SHAND: Does that mean that the learned Judges held that the provisions of the mortgage were *ultra vires*?

Mr. ROBINSON: Yes; that seems to be the effect.

LORD DAVEY: How did they come to file this Bill? This Bill does not ask for foreclosure.

Mr. ROBINSON: No; for nothing but sale.

LORD DAVEY: Did the Court give any reasons? What was the ground of their judgment—that the mortgage was *ultra vires*?

Mr. ROBINSON: No; the ground of their judgment was that the effect of this Section 278, which has been so much discussed, did not encroach upon the doctrine of Gardiner's case to the extent required to authorise foreclosure of a mortgage of a railway.

LORD DAVEY: But it did not authorise the sale.

Mr. ROBINSON: It did under some circumstances. The question is under what circumstances? They did not know, and did not profess to determine whether it did or did not authorise a sale of this section, but they said they think you have a right to proceed to have that question settled, and you may file a Bill for a sale. They did file a Bill for a sale, and it was settled, and it is before your Lordships. The sale was refused, but they said, We will allow you to file a Bill for foreclosure; we will not allow you to ask to be let into possession.

LORD DAVEY: They must have conceived that the second article of the mortgage was *ultra vires* of the Company. That gives express power to enter into possession?

Mr. ROBINSON: Yes.

LORD HOBHOUSE: They said, "The various Acts relating to the Defendant "Company to which reference has been made do not appear to me to have the effect of "ratifying by legislation any provision of the mortgage providing for possession by the "mortgagees, or foreclosure."

Mr. ROBINSON: They were not allowed to ask for foreclosure or possession. Then, accepting that position, they did what they were allowed to do, they asked for sale, and the sale was refused for reasons given. Now they appeal from that refusal. Is it open to them now to say, We ask the Court to determine what would be the liability of a certain subject matter, working expenses, if we had been allowed to proceed for possession, and if we had gone into possession?

LORD DAVEY: You say that is *res judicata*.

Mr. ROBINSON: Yes.

LORD DAVEY: And unappealable?

Mr. ROBINSON: Yes. They took the leave they got and proceeded upon it; and asked for what they were allowed to ask for.

LORD HOBHOUSE: I do not understand the view of the Acts at all.

Mr. ROBINSON: I hope to come to that, with your Lordships' permission.

LORD HOBHOUSE: You will show us that that is right.

LORD DAVEY: You are going to say presently that that would be equally applicable to a sale.

Mr. ROBINSON: Yes; but that it is applicable to the power to enter into possession. That there was no right to give that power here is, I think, a stronger position than with regard to sale.

LORD MACNAGHTEN: You say there is no provision in the Act for operating. There are provisions after sale.

Mr. ROBINSON: Yes; that is the first thing I call attention to as showing that the Legislature never could have contemplated there being any right for other people than the Company to enter into possession of a railway.

LORD DAVEY: Assuming, which the present position of the argument requires to be assumed, that it was within the powers of the Company to give a power of sale, if that power of sale was exercised (never mind how) by Trustees, then necessarily other people come into possession to operate the railway.

Mr. ROBINSON: There is provision for that. There is no provision for any one but the Company taking possession except after a sale.

LORD SHAND: They seem to have taken the point, we will not raise the question because we now decide it against you. That is the ground of the Judgment.

Mr. ROBINSON: Would not a Court do this here. Would not they say we think it perfectly plain you never can have any right to operate and take possession of the road? That was the decision of the Court.

LORD MACNAGHTEN: You say they have acquiesced in that?

Mr. ROBINSON: Yes. I think a sale was more pressed.

LORD MACNAGHTEN: I did not know how Section 2 had been excluded from consideration. Now I follow it.

Mr. ROBINSON: It is very peculiar that the only provision made by the Statute is—if at any time any of the railway or a section of the railway be sold. Now, plainly, the person who took possession here under the mortgage, as far as we can ascertain, would have no means of going to the Government, because there is no Statute applicable to it, and I suppose that was probably one reason why the Court refused leave.

LORD DAVEY: You say the purchaser could not charge any tolls?

Mr. ROBINSON: It is hopeless enough when you come to work what is authorised.

LORD HOBHOUSE: The power to operate is by contract, and if that was *ultra vires* there come two Acts of Parliament, the last of which says that the first preferential claims on the respective portions of the Company's undertaking are according to the tenor and effect of any deed of mortgage, conveyance, or assurance. In the schedule you find this mortgage.

Mr. ROBINSON: Your Lordship is anticipating my argument.

LORD HOBHOUSE: That is to be put against the Judge here, who gives no reason. You may give good reasons; but he has given none.

Mr. ROBINSON: I think the Court has fully considered it.

LORD DAVEY: The sting is in the last words of it, "and nothing in this "Act shall apply."

Mr. ROBINSON: Of course, the argument of the question of the right to decree of sale, as to the right to give a mortgage with a power of sale, as to the right to give a mortgage with a power to enter into possession, is one which requires elaboration and explanation. It seems to me it may or may not be necessary to enter into that. I think it probably is, in the view which your Lordships are taking, but perhaps it would be better to pass to the question of sale. All that they have asked in this Bill is for a sale. The Courts below have refused a sale. Is that judgment right on the ground on which the Courts have put it. They have said we cannot decree a sale of this first division, 180 miles of the road, first because a part of it is out of the jurisdiction, and secondly because it is impossible to sell the one part without the other.

LORD WATSON: There is no power to sell in sub-sections.

Mr. ROBINSON: No. Those two grounds we submit are clearly right. If they are wrong on those grounds there still would have been the right to decree a sale, which depends on whether the legislature in this particular instance authorised a mortgage with a power of sale; whether they authorised a mortgagee to enter into possession does not arise. It all turns on that. It seems to me well that I should say what little I have to say as to the two grounds taken by the Court, because if they are well founded grounds, and if there never can be a sale by reason of those two grounds taken by the Court, the other question becomes academic and unnecessary to discuss or decide.

In the first place the Court have said we cannot decree a sale of those 180 miles, because a portion of it is outside the jurisdiction of the Court, and of that portion we cannot decree a sale. Now is there reasonable doubt that that judgment is sound? This is not a decree *in personam* at all. I would have thought that it was perhaps a typical instance of a decree *in rem*.

LORD SHAND: The plaint, you mean?

Mr. ROBINSON: What I mean is what they asked for. Your Lordship is perfectly right. What they ask for here is, strictly speaking, as I should have understood it, a judgment *in rem*. They do not ask that anybody shall be ordered to do anything. They do not ask that any trust shall be administered, or that any contract should be enforced. They simply ask that the Court shall act directly upon the land in a foreign country, and sell it. Now, is it possible that any Court in one country has jurisdiction to do that with regard to real estate in another country? As regards Mr. Blake's argument as to the two countries, I suppose that they are quite as separate as the two Provinces of Ontario and Quebec. The North-West Territories have their own Legislature, their own Judiciary, their own Courts, and their own Executive. In every possible respect they are a complete Government in themselves. I do not now require to go into Authorities more than are entered into in the Judgment, but I have one more which I think it worth while to call attention to. In numerous instances the Courts have refused to attempt the sale of property in a foreign country by acting on the property itself, and they have refused to enter into any question of the title to land in a foreign country, because they say our decree or Judgment would be *brutum fulmen*, it would be useless, and it is not the practice, or course, of Courts to give Judgments which they have no means of enforcing. I have one more case which I do not think is referred to. It is the case of *In re Hawthorne*, 23 Chancery Division, page 743. It is a case decided in 1883. That was a case where a title to a house in Dresden was in dispute between A and B. "A sold the property in Saxony, received "part of the purchase money and took a mortgage for the balance. Both A and B "being in England an action by B to make A account for the purchase money was "dismissed for want of jurisdiction." Mr. Justice Kay says: "This is no question of "contract, but simply one of the right of succession to foreign lands. It is obvious "that neither Charles Hawthorne nor the Defendants is or are with reference to this "claim by English law in any fiduciary relation to the Plaintiffs. They are not "bound by contract with them, nor is the claim in any way based upon a suggestion "of fraud. It is a *bonâ-fide* claim, on both sides, of title to land, or the proceeds of

"land, in Saxony. The claim depends primarily upon the law of Saxony as to the "devolution of land in that country. I am not aware of any case where a contested "claim depending upon the title to immoveables in a foreign country, strictly so "called, being no part of the British dominions or possessions, has been allowed to be "litigated in this country simply because the Plaintiff and Defendant happened to be "here." Then his Lordship refers to Orr-Ewing as the strongest case tending in the opposite direction, and distinguishes it.

I have listened to all the precedents read by my learned friend from Palmer. I do not see how they can be authority until one knows all the circumstances under which such a decree was framed. Nobody disputes that there may, under certain conditions, be something which would warrant such a decree; but what those circumstances were we do not know.

Then we have in our own Courts distinct authorities that the Courts of Ontario will not pretend to sell land in Manitoba. No doubt there were cases in the old days when the Courts, under the exercise of a sort of superintending jurisdiction, did sell land in some of the plantations or colonies. I think that was more this, that when there were no Courts in those colonies to transact judicial business, they were organised and had Courts of their own. I do not think I need dwell upon that because it is very thoroughly worked out, and discussed in the Judgments. The authorities are all cited, and the law up to that time, as it is said in our Supreme Court, is the culmination of the law upon that subject, and it is all gathered in the Moçambique case. The law seems to be clear.

LORD DAVEY: I do not think Mr. Blake disputed that a Court would not make a decree *ad rem*, or give a Judgment *ad rem* affecting land out of its jurisdiction. His contention was that this was not a Judgment *in rem*.

Mr. BLAKE: Yes.

Mr. ROBINSON: I ask, what is it they ask for—what is it that is refused? They asked that the Court should order a sale of this land under their direction, and the Court refused to do so.

LORD MACNAGHTEN: May we not give them something less than they ask?

Mr. ROBINSON: That again raises the great difficulty which I am in with regard to several points here. I think my learned friend suggested that this may be regarded as a suit for administration of a Trust. I do not understand exactly what Trust is to be administered. Where is the Trust? Where are the *cest in que* Trusts?

LORD WATSON: In a case of administration the Court may direct some person who is the administrator, not subject to their jurisdiction, in the course of administration, to realise and sell, but they cannot direct a sale.

Mr. ROBINSON: I suppose that is hardly arguable. Then my learned friend suggests that this is in some sense, though I do not quite know how, a personal decree. Well it certainly does not act as against any person. It simply acts as against the

land. I mean it is a request distinctly for a Judgment *in rem* acting upon the land. No person is named ; no person is affected. I think it would require a good deal of consideration before anyone could say that there is any person ordered to do anything. I do not propose to speak with the slightest confidence in these matters, but who here could be ordered to do anything with regard to this land ? What have we contracted to do with regard to it ? We have given them a power of sale which they do not choose to take advantage of.

LORD HOBHOUSE : The only personal order would be on the Company to sell, and that is not the contract. I do not know that they have power to sell.

Mr. ROBINSON : Who is it they could ask to be compelled to do anything, and what ?

LORD MACNAGHTEN : Why should not there be a declaration that they are entitled in the event which has happened to exercise the powers given by Article 2, with liberty to apply in the event of any question arising ?

Mr. ROBINSON : Article 3 is the power of sale. I do not know of any difficulty. They are not attempting to exercise that power of sale. They do not require to go to the Court to exercise it. There is no question of that. The reasons are obvious. They do not choose to resort to their power of sale.

LORD SHAND : If it were not for that 9½ miles you could not object to their getting all they ask.

Mr. ROBINSON : Oh yes, I should object on other grounds altogether, but at present I am not touching them.

LORD DAVEY : You are merely on the question of jurisdiction now ?

Mr. ROBINSON : That is all.

LORD DAVEY : Mr. Robinson is going to argue that in this case, a sale was an inappropriate remedy altogether.

LORD SHAND : Would the argument you are now submitting apply equally within the Territory ?

Mr. ROBINSON : No, it would not, of course.

LORD HOBHOUSE : No question of jurisdiction would arise then.

Mr. ROBINSON : It seems to be conceded that that being the position of the 9½ miles, the Court cannot order a sale under their direction.

LORD SHAND: Except as to the 9½ miles there is a power of sale. You may concede that for the purpose of the argument.

Mr. ROBINSON: Yes, for the purposes of this argument.

LORD SHAND: Are they not entitled to say as to the great bulk of this:—We have a power of sale. With regard to the rest we ask for an Order, which shall be a personal Order, an Order *in personam*, against the Company, which is subject to the jurisdiction, to aid us with reference to the remaining part which is within our mortgage.

Mr. ROBINSON: There are endless objections to that.

LORD WATSON: If a question arose as to whether the exercise of the power of sale of the whole section is legal or not, surely that is a point they would have jurisdiction to determine?

Mr. ROBINSON: I suppose so. I suppose they would have power to say whether they could sell the part within the Jurisdiction.

LORD DAVEY: You say that there is nothing in this Bill—and I confess the frame of the suit has created as much difficulty as it is possible for it to create—excepting the prayer for further relief, which asks for anything to be done to aid the Plaintiffs in exercising their powers of sale?

Mr. ROBINSON: Not a hint of it.

LORD DAVEY: There is no allegation leading up to it to say that in consequence of not having a legal estate in the part or any imperfection in their title, they require anything to be done under the covenant for further assurance. There is no allegation.

Mr. ROBINSON: There is no allegation whatever.

LORD SHAND: The case discloses that state of matters quite clearly.

LORD DAVEY: No, I think it does not.

LORD SHAND: The moment it comes to be examined it disclose that that is the state of matters, and I understand Mr. Blake could not put this part of his argument on anything except that general clause.

LORD HOBHOUSE: You are not prepared to assent to the proposition that all these things are relegated to the Master's Office?

Mr. ROBINSON: No, I know nothing of it.

LORD SHAND: The way its strikes my mind is rather this. They ask for a sale of the whole; you come forward and say you cannot get that because there are 9½ miles beyond, which the Court have no jurisdiction over. That is disclosed on the facts which arise on your defence. Then they say: "Very well, but we have here "claimed that we should have such further and other relief as to your Lordships "should seem fit; and under that we ask that we should have an order to compel the "Railway Company, who are subject to your jurisdiction, to aid us in meeting this "very great difficulty, which only arises in their defence."

LORD DAVEY: The answer to that seems to be that it is not what they ask for.

LORD SHAND: It occurs to me it would not be necessary for a Plaintiff to aver: "I have got this difficulty in my way, and the way I propose to get over it is so and so."

LORD DAVEY: I do not see any difficulty in exercising that power of sale.

LORD SHAND: That is the difficulty that there is no jurisdiction in regard to that which is beyond.

LORD MACNAGHTEN: I do not see any difficulty either, but there may be difficulties in the course of exercising it.

LORD HOBHOUSE: Unless they know what the terms of the contract are, it is utterly impossible to suppose that they could sell. That is the real and substantial difficulty. Otherwise they might go into the market and sell to-morrow, if it were a farm-house.

LORD SHAND: I was making an observation with reference to your remark that you are to treat this purely as an action *in rem*, and that it cannot be regarded in any other way, and it occurred to me that that is a reply to your suggestion.

LORD DAVEY: Mr. Robinson is speaking of the action as lodged.

LORD SHAND: I am taking it so.

Mr. ROBINSON: I understand that under the prayer for further relief they can only get such relief as something which they have previously stated entitles them to.

LORD SHAND: Such relief as your defence has raised. They were not bound to bring in this point about the 9½ miles. You raise that point, and in reply they say well, we ask for such relief as is required.

Mr. ROBINSON: What is the further relief that they do require?

LORD SHAND: They certainly require in that case a decree which is not a decree *in rem*, but a decree to order the Company to do something.

Mr. ROBINSON: What is it they want us to do?

LORD MACNAGHTEN: Does it embarrass you at all? It may have a great effect on the question of costs. Suppose they had amended their Bill?

Mr. ROBINSON: I suppose they might have framed a different case and asked for a different relief.

LORD MACNAGHTEN: Substantially what they want is to enforce their security by sale. They could, I should suppose, have amended their Bill so as to bring the question fairly before the Court. They have not done so, but in abstaining from doing so have they put you to any great disadvantage?

Mr. ROBINSON: I do not think to any further disadvantage than this, that I do not really know exactly what they would ask if they had amended their Bill. If I knew exactly what it is that they would ask in the shape of relief, then I could endeavour to answer it.

LORD DAVEY: Suppose they had asked this: that it may be declared, according to the true construction of the contract that the property when sold under the power of sale would be free from any charge from working expenses for the rest of the line, and had alleged that the title of a portion of the property not completed at the date or the mortgage required completion under the covenant for further assurance, and then asked for a declaration of the construction of the Deed so as to show exactly what it is they sold, and then asked that the company might, if and when the power of sale was exercised by the Plaintiff, concur and do all necessary acts for the purpose of completing the title, and giving effect to it.

Mr. ROBINSON: They might have asked that.

LORD DAVEY: You say, and I quite follow you, that would be a different Bill.

Mr. ROBINSON: It would be a wholly different Bill. What is it that the companies require to do to assist them?

LORD HOBHOUSE: Would there have been different evidence?

Mr. ROBINSON: I cannot say.

LORD MACNAGHTEN: If it requires amendment, that is all; but so long as they operate that section the charge continues.

Mr. ROBINSON: That power would assume a vasid power of sale.

LORD MACNAGHTEN: Supposing we say nothing about the power of sale. Supposing we merely correct the decree by limiting the duration of the charge to the period when the Company operates the entire section.

Mr. ROBINSON: That would be within the jurisdiction of the Board.

LORD MACNAGHTEN: You say that we have power to put the proper construction. You are not agreed as to the true construction of the order.

Mr. ROBINSON: What I say is that that is perfectly right as it stands: it is a perfectly right direction as regards the present state of things.

LORD MACNAGHTEN: They say as long as it stands at present it will bind us in the event of a sale.

Mr. ROBINSON: I do not think it would by means of this order.

LORD MACNAGHTEN: It is open to that.

LORD DAVEY: I express no opinion whether it is the construction I should myself put upon it, but I can see that it is open to that.

LORD MACNAGHTEN: It is not inconsistent.

Mr. ROBINSON: I should have thought it was. I suppose the Court might say that declaration was confined to the period before sale.

LORD SHAND: That would be met distinctly by the words: "This Court doth order and declare that until the sale"—those three words would settle it.

Mr. ROBINSON: I think that was what was intended to be said, that it was only intended to be applied to the period before sale.

LORD DAVEY: Was there any application at the trial of the action for amendment of the Bill:

Mr. ROBINSON: None whatever. Then, my Lords, I come to the second part with regard to the sale and as to the Judgment of the Court, namely, whether you can sell 170½ miles separately.

LORD MACNAGHTEN: Supposing you made a declaration with regard to that, the Court would say that they could not.

Mr. ROBINSON: That is what the Court have decided, and I suppose it would be simply affirming the Judgment.

LORD MORRIS: Did the Court decide that they could not sell part?

Mr. ROBINSON: Yes; the Court decided that the two parts were inseparable.

LORD MORRIS: Except for the want of jurisdiction what did the Court say as to being able to sell Section 1?

Mr. ROBINSON: That they could.

LORD HOBHOUSE: They distinctly held that that could be sold.

Mr. ROBINSON: Yes. They said simply that being unable to sell the whole for want of jurisdiction, they could not sell the part.

LORD DAVEY: The power to sell is not, as it is sometimes expressed, the power to sell in lots, but to sell the entirety.

Mr. ROBINSON: Yes.

LORD HOBHOUSE: They refer to the Act of 1893. It may be sold as a distinct and separate portion. That is the clear judgment. But then they decline to say what would be the condition of the railway with respect to working expenses in the hands of the purchaser.

Mr. ROBINSON: Yes.

LORD HOBHOUSE: They say at present that they do not see that they are called upon to do that.

LORD DAVEY: Taking the pleading very technically, this Bill, according to their view, is confined to the mere application for a Receiver.

Mr. ROBINSON: Now with regard to the right to sell these 170½ miles separately.

LORD DAVEY: Under the power of sale.

Mr. ROBINSON: Yes.

LORD DAVEY: There is no power under the power of sale.

LORD HOBHOUSE: Is there any reason to suppose that this was not discussed fully?

Mr. ROBINSON: I do not believe it was discussed, but I do not speak with any knowledge, for I know nothing.

LORD DAVEY: All the learned Judges say it is not a Bill for the Administration of Trusts.

Mr. ROBINSON: It is not an attempt to exercise their power of sale.

LORD MACNAGHTEN: I do not see that such an amendment as Lord Davey suggests would be anything but a proper amendment under the circumstances if we were inclined to make it; nor can I conceive that any fresh evidence would be required to deal with the question.

Mr. ROBINSON: The important part of it seems to be that we should be asked to concur in giving them any assistance in exercising their power of sale, and for further assurance.

LORD MACNAGHTEN: So far as that covenant binds you to do it you do not refuse that, do you? Would you mind undertaking——

Mr. ROBINSON: I should be sorry to enter into any undertaking. It is very difficult to say, when these things have not been brought before you properly. I myself do not quite understand what we are required to do to assist them.

LORD MACNAGHTEN: Nor do I. Supposing they were to put the whole railway up for sale, and somebody was foolish enough to buy, then what is the next step? He might require the concurrence of the Company. What would the Company do?

LORD SHAND: Lord Watson has just said that one thing certainly would be necessary and desirable, namely, that your Company should concur in the conveyance.

LORD MACNAGHTEN: What would the Company say in answer to that?

Mr. ROBINSON: I really cannot say what they would say in a case of that sort. I should first ask, why do you require that concurrence? I do not see that it is necessary in any way. Is it not a totally different Bill? They come here and ask the Court to decree a sale under the direction of the Court; if your Lordships will permit me to put it in that way; they come asking for a sale of the land under the direction of the Court. It being clear that they cannot get that, they come and say, well, in case we should think it desirable to attempt to exercise our power of sale, we want a decree that you shall give us every assistance. Is it not an answer to that, to say you had your own choice; you did not choose to attempt to exercise your power of sale, and we never refused to give our assistance.

LORD MACNAGHTEN : I do not suppose they could with any success exercise that power as long as you fairly give notice to an intending purchaser you are buying nothing, for we have a prior claim to all the revenues of this section. I do not see how they could sell.

Mr. ROBINSON : They have always had the right to exercise the power of sale, and they have deliberately abstained from attempting to do so.

LORD DAVEY : It would be in the nature of a Bill which we used to be familiar with to remove a cloud on the title. You set up a claim which would prevent their selling, and they say let us have a declaration saying that our title is clear from this pretended blot.

Mr. ROBINSON : That would be all right if they were attempting to exercise the power which would require that declaration, but they are not.

LORD DAVEY : You say there are no appropriate allegations in the Bill for the purpose of raising that case ?

LORD MACNAGHTEN : You say you cannot suppose that they would exercise it ?

Mr. ROBINSON : On the contrary, they intimate that they do not think it their interest to attempt to exercise their power of sale.

LORD MORRIS : If they had a declaration that in the exercise of their power of sale the section sold was free from any claim to contribute to the rest of the line, why would not they exercise that power of sale ? They could get up a syndicate.

Mr. ROBINSON : Yes, no doubt ; that is precisely what would be attempted, and would probably fail.

LORD MORRIS : That is really the great subject of controversy, whether if the first section was sold it was liable to any contribution towards the expenses of the rest of the railway. If we confined ourselves to that I think it would be better.

Mr. ROBINSON : It would be in the discretion of the Court to make any declaration. Why such a declaration should be made if they think the Court was right in saying that they have no power to decree a sale, it is of course for this Board to determine.

LORD DAVEY : Mr. Blake objects to the form of the declaration regarding the revenues, and profits, which he stated in a very broad form, and not merely directions to the Receiver, so that the Court has already made a declaration on the construction of the deed in that respect ; and, if we think that declaration requires amendment, or further explanation, or is wrong, it is surely within our jurisdiction to substitute another declaration for it.

Mr. ROBINSON: Then in no way could it be sold.

LORD MACNAGHTEN: They had no power to sell it.

Mr. ROBINSON: No; no power under the power of sale.

LORD MORRIS: How was the railway made? Was it not originally made under a provincial Act of Manitoba alone?

Mr. ROBINSON: Yes.

LORD MORRIS: How did they make it for the nine miles outside the boundary.

Mr. ROBINSON: That was not made under the Act of Manitoba. Long before that was made it became a Dominion Railway. They could not get power from Manitoba to go into North-West Territory. When they wanted power to go into North-West Territory they had to go to the Dominion Parliament for it, and the Dominion assumed it as a Dominion Railway.

LORD HOBHOUSE: It has been subject to the Dominion Legislature ever since?

Mr. ROBINSON: There is no question of that, except as my learned friend said with regard to the aiding and subsidising it. It has borrowed sums of money from Manitoba, and Manitoba has passed Acts giving it aid. That is one of those questions that I should have pointed out to the Court. Your Lordships will find it in the Statute, the Act of Manitoba, giving aid generally to the Railway Companies, under which the Railway Company has been aided, and they provide that the rails shall never be removed until the Government of Manitoba sanction it. They further provide that no aid shall be given until the Lieutenant-Governor in Council is satisfied that they are in a position to carry out their undertaking. How this undertaking will have to be carried out in the present state of things, and what will become of the public money, it is very difficult to see. Is it necessary for me to discuss the question as to the right to sell under the power of sale. As to the right of the Court to decree a sale of the 170 miles they have said they have no right. If that is clear I do not wish to say more about it.

LORD HOBHOUSE: I do not think you need labour that.

Mr. ROBINSON: When evidence was attempted to be given, as to its being or not being a section, it was they who objected. They said we have a right to sell it without any evidence; we have a right to assume it to be a section.

LORD HOBHOUSE: The question behind that assumes importance. I understand you to say, not only the questions are not raised, but the Appellants are absolutely precluded by the Order from raising them at all, and never could raise them in Court.

Mr. ROBINSON: Yes.

LORD HOBHOUSE: It may be necessary to present a formal appeal from the Order on this petition; I do not know.

LORD MORRIS: It was the portion of the railway that was made under the Manitoba Act?

Mr. ROBINSON: I do not think it was made under the Manitoba Act at all.

LORD MORRIS: Not the 170 miles?

Mr. ROBINSON: No, it was not made till long after it became a Dominion road.

LORD MACNAGHTEN: Manitoba authorised the railways as far as the extent of the Province.

Mr. ROBINSON: That is 170½ miles, yes; but as a matter of fact it was not 170½ miles then, the boundary was in a different place at that time.

Mr. BLAKE: There was another Manitoba Act after the boundary was changed, exteding it to the new boundary. I gave it to their Lordships.

LORD HOBHOUSE: That does not affect the present question.

Mr. ROBINSON: No. Well, then, I understand I am not called upon further to discuss that question as to the power of the Court to sell this 170½ miles. The judgment of the Court in that respect we say is right. First they say we have no right to sell the whole because part is out of the jurisdiction, and not being able to sell the whole we have no power to sell the part. Of course if the Judgment is right in that respect it is a mere academic question to discuss whether this mortgage giving a power of possession or a power of sale is valid or not.

LORD DAVEY: You say there is no evidence of an intention to exercise it.

Mr. ROBINSON: None whatever. There is no hint of an intention to sell these 170½ miles. You will see what the result would be. We should have three sections then. We should have the part of the boundary under one direction, and the 9½ miles owned by somebody else, and utterly worthless, and then we should have the remainder.

LORD SHAND: The 9½ miles would go in with the remainder, would not it?

LORD WATSON: I do not think the question of entering into possession is before us, except to this extent that the provisions made with respect to the receipts and expenditure under that section may throw some light upon the other questions contested.

Mr. ROBINSON: Then I pass to the remaining question as to the validity of the power of sale in this mortgage, and the right to give the power which exists in it to enter into possession.

LORD SHAND: The Court is not with you on that.

Mr. ROBINSON: No; the Court is against me on that.

LORD DAVEY: If, as you contend, no order, or direction, or decree can be made in this suit respecting the power of sale, ought we to discuss the validity of it?

Mr. ROBINSON: I thought not. We rest upon the correctness of that Judgment. I am quite prepared to go further and discuss it.

[Their Lordships deliberated.]

LORD WATSON: A serious question arises on this record—how far you can ask us to decide this question. Your record does not raise it. By implication it assumes the existence of a power.

Mr. ROBINSON: I think not, my Lord.

LORD WATSON: I think we had better call attention to that at once. It is at page 14. There you say "We further say that the right of the Plaintiffs to sell the "first division of the Defendant Railway, or the right of a purchaser of the said first "division to take possession thereof has never been discussed between the Plaintiff and "us, and it is not correct that we have denied such right as alleged in the 21st "paragraph of the Bill." Then you say this at paragraph 7. You do not say that the Court have no power, but you say this—that no fact has been alleged or shown which raises the power. You say: "We further say that the Plaintiffs have not, by "reason of any fact set out in the said Bill of Complaint, any right to ask this "Honourable Court to decree a sale of any portion of the said railway or other property "referred to in the said Bill."

Mr. ROBINSON: Is not that sufficient?

LORD WATSON: Certainly not. It assumes that the power exists.

Mr. ROBINSON: Then go on further.

LORD WATSON: It is not that no time exists, but that the time has not arisen for exercising it. It proceeds upon the assumption that if such fact had been shown, there would have been a power of sale.

Mr. ROBINSON: Look at paragraph 9.

LORD WATSON: There is not even a delicate insinuation that there is no power of sale. Section 9 says it confers no equity on the plaintiff to ask for a judicial sale.

LORD HOBHOUSE: The Plaintiffs allege in their Bill that you say that the bonds are invalid and the indenture is *ultra vires*, that is, that the power of sale was *ultra vires*, and therefore the sale cannot be carried into effect so well as under the direction of the Court. That is their allegation in paragraph 21. Your answer to that is, that the right to take possession has never been discussed; it is not correct that they have had such a right as alleged in paragraph 21.

Mr. ROBINSON: Then we say it has never been discussed between us.

LORD HOBHOUSE: You do not admit their right?

Mr. ROBINSON: No.

LORD DAVEY: The Plaintiffs ask for no declaration on that point.

LORD HOBHOUSE: They give the go-by to it, and they say, there being these disputes let us have the direction of the Court. The Court refuses the direction on the ground that they have no jurisdiction. Are not they at liberty to refer to the disputes, and say, let us have a declaration on that point at all events?

LORD SHAND: Lord Hobhouse has drawn attention to Article 21. Now look at your Article, page 14, line 38. "We further say that we have never expressed "opposition to giving up possession of such first division to any purchaser thereof "provided the sale be regularly and properly made to such purchaser pursuant to any "powers given to the Plaintiffs and provided that such purchaser be legally entitled "thereto, and we have never adopted any antagonistic position to the Plaintiffs as set "out in the 21st paragraph of the said Bill."

Mr. ROBINSON: We say it has never been discussed between us.

LORD SHAND: There is no indication that you were going to maintain that the bonds were bad as giving a power of sale.

LORD DAVEY: I do not say that you have prejudiced yourselves by it, but

you carefully abstain from raising the question of the invalidity and you confine yourselves to saying it is not an issue.

LORD HOBHOUSE: In their prayer the plaintiffs give the go-by to the question. They ought to have prayed in the alternative. In their allegation they do not do that, but they say here are these disputes, now let the Court decide.

LORD WATSON: Section 9 is a plea really against the jurisdiction of the Court. What is still more against your contention is this in paragraph 9. "And "except by virtue of such instrument the Plaintiffs have no rights in the premises, "and we submit that the Plaintiffs ought to be left to the remedies provided by the "said instrument." You now say that they are not entitled to "the remedies "provided by the said instrument"?

Mr. ROBINSON: You must surely take that in connection with their assertion and our distinct denial of the validity of the mortgage which we have never disaffirmed. Your Lordships will see that is the difficulty of raising questions which are not in issue.

LORD SHAND: The Bill is based on the validity of the power of sale because they ask the Court to order a sale. If they had not that power they could not have asked the Court to act upon it.

Mr. ROBINSON: Oh yes, my Lord.

LORD SHAND: You mean as a mere creditor.

MR. ROBINSON: No, as a bondholder; there is no question of that. This Bill does not proceed in any way on the power of sale. Now they want to rely on the power of sale and they want various declarations relating to it.

LORD DAVEY: If it were not for that I think you would have liberty to apply if the power of sale is invalid, but suppose you do not get that.

Mr. ROBINSON: That would be a different thing. If they get the relief they pray for, namely, a judicial sale, that is another thing altogether.

LORD DAVEY: You say they ought to be confined to that?

Mr. ROBINSON: Yes. If they want relief founded on the power of sale they have never yet claimed it, only here for the first time——

LORD DAVEY: I think Mr. Blake asked for it,

Mr. BLAKE: I was misapprehended. I put it in the early part of my opening on the double ground. I ask your Lordships to determine on both grounds.

Mr. ROBINSON: Surely in these circumstances we have a right to test its validity. That is a very wide and important question.

LORD DAVEY: We have no judgment of the Court below.

LORD SHAND: The Manitoba case would probably be analogous.

Mr. ROBINSON: Yes.

[*Counsel were directed to withdraw and their Lordships deliberated. After some time Counsel were re-admitted.*]

LORD WATSON: You were proceeding as we understood to argue that the power of sale has not been legally conferred by the mortgage because it was contrary to statute?

Mr. ROBINSON: That was substantially the ground.

LORD WATSON: It appears to their Lordships that this point is not raised by the Record. It is not expressly decided in the Court below, and anything the Court say upon it are mere casual observations, which imply that they treat it as a valid power and assume its validity. But the validity or invalidity is not raised. If so matters stand in this position. If it really be relevant to your case in the present suit and you fail to raise it in either Court below can you be heard to discuss it here? This Board will assume that having failed to state it you have, so far as this litigation is concerned, waived it. If it is not pertinent to the present case, but is really pertinent to some issue which is not raised in this case, there seem to be equally good reasons why this Board should not hear argument upon it. Of course, in that view, if you assure us that it is pertinent to another question which may arise, and is not pertinent to this question which has arisen, the Board must be careful not to prejudice any appeal on the other question by any observations which they make. Do you say it is relevant to this case?

Mr. ROBINSON: No. I say it is not relevant to this case in any way. That would be my answer.

LORD WATSON: I understand you to say it is irrelevant because in their Bill the Plaintiffs merely ask the Court to exercise its ordinary jurisdiction as between mortgagor and mortgagee, and that the Court were not asked either to authorise or to decree a sale in the same terms as is authorised by the mortgage.

Mr. ROBINSON: Yes, or that the Plaintiff could not proceed under that. I only want to be quite clear that I understand what your Lordship intimates.

Practically it would not be a concluded question here? The Judgment of the Court would not preclude questions as to the validity of the power of sale?

LORD WATSON: There are many obvious reasons why, if possible, this Tribunal should not dispose of important questions of Canadian law which are not raised by the pleadings, and are not noticed by any member of the Court.

LORD DAVEY: We have not the advantage of any opinion of the Judges in the Court below.

LORD WATSON: There is nothing in the observations of the Judges—there is not a single sentence as far as I can find to indicate that they treated it as a matter of dispute and controversy.

Mr. ROBINSON: No. If it is not to be concluded by this decision I should not desire to press it. That concludes my argument. I merely wish to say this with regard to that decree and its form. The decree my learned friend says was settled between the Counsel on the other side and myself, not by the Court, and that with regard to the question of the working expenses, it was intended to be confined to the period before sale. We have no objection to its being so expressed. My learned friend and I, in the interval, have agreed upon this, that if the Court should think it right to make any change, it would be, as we believe, what was intended by both parties, that that liability should be declared until sale, and without any prejudice to the question as to the validity of the power of sale contained in the mortgage, and as to whether any sale whatever can be validly made of the first division, or any part of it. That is what we understood. I thought it right to tell the Court that.

LORD DAVEY: Would you have any objection to this being put in at page 40 in the decree, that you were subject, together with the other revenue of the Company, to the payment?

Mr. ROBINSON: No, I should have thought not.

LORD DAVEY: That is what you mean.

Mr. ROBINSON: It is what I meant.

LORD DAVEY: I do not think they want any alteration.

Mr. ROBINSON: I thought it meant that, without more.

LORD WATSON: It must be sufficiently indicated as to the right of the mortgagees and the Receiver as long as the railway is operated by a company who own it. Their right is to a proportion of the net receipts of the railway ascertained in a particular way.

Mr. ROBINSON: Yes.

LORD HOBHOUSE: Then words should be introduced into the decree to show that it is intended only to apply to the period of the Receivership while the railway is operated by the Company.

Mr. ROBINSON: I have no objection to it.

LORD HOBHOUSE: It would be strictly confined to that. It is expressed that the whole mortgage is made subject to the working expenses. You do not contend for that construction of the decree?

Mr. ROBINSON: Oh, no.

LORD HOBHOUSE: That the whole mortgage and every interest conferred under it is made subject to the working expenses of the railway. That is the literal effect of the words, that the mortgage is made subject to the working expenses, to state it shortly. If so, every interest conferred under it is bad.

LORD DAVEY: It is only the mortgage of the revenue.

Mr. ROBINSON: All that I do not contend for is that the revenues of this division are subject exclusively to the payment of the working expenses of the whole.

LORD HOBHOUSE: Are "exclusively," no, no. Do you contend that if the status is altered either by entry or by sale then the revenues are subject to the working expenses of the whole? Do you contend for that construction of the decree?

Mr. ROBINSON: Oh no, I do not contend for that construction of the decree. I think the decree is confined entirely to the period before sale, and does not deal with any period after sale, or any entering into possession. That is our construction.

LORD HOBHOUSE: It applies to the *status quo.*

Mr. ROBINSON: Yes, at present, and I have no objection to any words that will express that clearly, if necessary.

LORD HOBHOUSE: I want to know what the effect of these prior proceedings is. Are the Plaintiffs shut out from maintaining in Court that they have a power of entry?

Mr. ROBINSON: I have not considered that question at all.

LORD HOBHOUSE: I thought you said that the order on the petition shut them out from raising any question excepting those which they were empowered to raise.

Mr. ROBINSON: My impression, without consideration, would be so. Would your Lordships permit me to say that that is a question depending more upon equitable proceedings, and my branch of the law has not been Equity. If your Lordships will permit it, Mr. Swinfen Eady will address himself to that.

Mr. SWINFEN EADY: My Lords, I am with Mr. Robinson. Having regard to the present position of the case with regard to the working expenses, I have really but little to add, because I quite accept the construction of the order which Mr. Robinson is willing to put upon it, and which in our view was the contention of the parties. The counsel met and settled the form of judgment between them, and I understand it was framed by consent in order to give effect to that view. Any words with a view to making clearer that decision we raise no objection to.

LORD SHAND: The Counsel merely adjusted the judgment as they understood the Court had given it.

Mr. SWINFEN EADY: Quite so; that is to say they merely settled the language, that is all.

LORD MORRIS: The notes of the decree are settled by Counsel very often in this country.

LORD DAVEY: "Minutes to be settled and signed by Counsel." Now it is altered to "consent by the Paintiff's Counsel."

Mr. SWINFEN EADY: I think that appears clearly to have been the intention, because your Lordships will have observed that in the judgment of the Court below there is a provision with regard to applying to the Master.

LORD WATSON: I understood Mr. Blake to desire that there should be a declaration of the rights of the parties in the event of a sale; that the section sold is to be free from any charge as to the working expenses.

Mr. SWINFEN EADY: That is an entirely different matter.

LORD WATSON: It is a matter which the Court declined to decide.

Mr. SWINFEN EADY: Yes.

LORD WATSON: And they did not decide it.

Mr. SWINFEN EADY: Yes. I will answer now the question put by Lord Hobhouse to Mr. Robinson with regard to what the effect is of the petition for leave to take proceedings and of the order made.

LORD MACNAGHTEN: How do you think paragraph 2 would run?

Mr. SWINFEN EADY: I think it should run like this, at page 40, line 11:—"This Court doth further order and decree that 'by' the mortgage"—inserting the word "by"—"that by the mortgage by the Defendant Company to the Plaintiff "referred to in the Bill of Complaint herein"—and then omit the word "of"—"the "revenues, freights," and so on.

LORD MACNAGHTEN: I think Mr. Blake gave us that.

Mr. SWINFEN EADY: I accept that.

LORD SHAND: I also understood that the words "prior to any sale" might come in in some part of that, so as to show that it was not dealing with what might happen if a sale occurred.

LORD HOBHOUSE: There should be some alteration of that kind made.

Mr. SWINFEN EADY: I think if it were put in this way, as it really was intended, "so long as the Receiver is in possession." These words would be colourless. That was intended really.

LORD SHAND: I think it was intended from the preceding paragraph.

Mr. SWINFEN EADY: It is the Court's direction really to the Receiver as to the way in which it is to be done.

Mr. BLAKE: Where do you propose that that is to come in?

Mr. SWINFEN EADY: Then if your Lordships put it. "So long as the Receiver is in possession."

LORD SHAND: "This Court doth further order and decree that so long as the Receiver remains in possession."

Mr. BLAKE: But the Receiver is not in possession.

LORD SHAND: There is an appointment of a Receiver at all events.

Mr. SWINFEN EADY: Yes.

Mr. BLAKE: The Company remains in possession, and that is the very theory of the decision.

Mr. SWINFEN EADY: He is not manager.

LORD SHAND: "During the subsistence of the appointment"?

Mr. SWINFEN EADY : Yes ; or "whilst his appointment continues."

LORD SHAND : Then I understand it was also suggested about the 5th line that there should be something such as Lord Davey spoke of.

LORD DAVEY : I do not care about it.

LORD SHAND : "Subject with the other revenues of the Company, to the" —Mr. Blake raised a point as if he did not understand that that was quite clear.

LORD HOBHOUSE : It may be convenient in the order to refer to Article 19, and say that the Receiver is the Receiver of the earnings covenanted to be paid. The exact language must be settled carefully.

Mr. SWINFEN EADY : Yes ; or immediately after the word "subject"— "together with the other revenues of the Company." That was the intention on that point. There is no difficulty in ascertaining that. Then to answer the question put by Lord Hobhouse, as to what the effect of the order was, under which an application was made for liberty to enter into possession.

LORD MORRIS : For liberty to take proceedings.

LORD HOBHOUSE : To intervene and take proceedings, notwithstanding the Receivership.

Mr. SWINFEN EADY : For certain purposes. The application was for liberty to take proceedings with a view of taking possession or operating, and with a view of taking proceedings for foreclosing.

LORD HOBHOUSE : Why should they be limited in their claims that they raise.

Mr. SWINFEN EADY : I was going to answer that. As I understand from Mr. Phippen, who was present below, what took place was this, that upon that petition the matter was argued and discussed, and judgment given on the merits.

LORD SHAND : Will you oblige me with the report, and I think I can give you the key to the decision.

Mr. SWINFEN EADY : Then the parties acquiesced in that, and were not desirous of raising any question further.

Mr. BLAKE : That is not so. We are obliged to differ from that statement.

LORD MORRIS : It was really to get rid of the contempt of Court in bringing

a proceeding to oust the jurisdiction of the Court, that it became necessary to apply. It is a formal matter so far as I am aware, which is *ex parte*, and always made *ex parte*.

LORD DAVEY: It is *ex parte* in England.

Mr. SWINFEN EADY: Yes.

LORD MORRIS: I am only speaking of that which I know.

Mr. SWINFEN EADY: I think when your Lordships see the frame of the Bill in this case you will see exactly why it was not thought proper to take further proceedings on those lines.

LORD MACNAGHTEN: I cannot understand why the mortgagees should desire to take proceedings on these lines under any circumstances.

Mr. SWINFEN EADY: Or for foreclosure. I do not think so. In substance when you see the allegations in the Bill and especially the prayer of the Bill, and see what the Plaintiffs were desirous of obtaining, they were not desirous, as I understand, of foreclosing, or proceeding to exercise any power of sale which they themselves might have in this mortgage. The Bill is framed on a different hypothesis, and when your Lordships look especially at the prayer of the Bill I think it becomes evident what the Plaintiffs in the action really desired. The second paragraph of the prayer at page 13a is:—"That all the property described in and included under the said Indenture may "be sold under the direction of this Honourable Court, and that the Plaintiffs may "have liberty to bid at such sale." That is a judical sale. It is this: what we want is the assistance of the Court—a judicial sale. There is no question about our exercising any power of sale under our mortgage deed. If we had wished to do that they make no case for coming to the Court with regard to that.

LORD MORRIS: Is there any necessity for them in accordance with the rules of the Manitoba Court to make any case except that they had a mortgage, and wanted to sell under a decree of the Court?

Mr. SWINFEN EADY: I apprehend it would be necessary to make some case, and not that they wanted to sell it. This prayer is inconsistent with that.

LORD DAVEY: They wanted the Court to sell it.

Mr. SWINFEN EADY: They wanted the Court to sell it because they wanted leave to bid.

LORD WATSON: If they desired to exercise the power themselves, they could have informed the Court of that, and asked the Court to declare the rights.

LORD MORRIS: As in Ireland, if a man has a mortgage he has nothing to do but to file a Bill and say he wants to sell for no reason at all except that so much is due to him.

Mr. SWINFEN EADY: Quite so, and with reference to that I apprehend your Lordship's observation is confined to lands within the jurisdiction of Ireland, but here, if you will look at paragraph 2 of the prayer it is important as showing exactly what the Plaintiffs desired.

LORD HOBHOUSE: I want to know why they were shut out from raising any question they pleased in Court. Supposing they wanted to enter, they could not do it because it would have been a contempt of Court.

Mr. SWINFEN EADY: Yes.

LORD HOBHOUSE: Why in the world should they not be empowered.

LORD DAVEY: Mr. Swinfen Eady suggests that they did not ask for it.

LORD HOBHOUSE: It may be so lent in giving leave you would generally give leave to a person to raise any question which he was entitled to raise notwithstanding the Receiver was appointed by the Court.

Mr. SWINFEN EADY: If he wanted to.

LORD HOBHOUSE: Why in the world were they confined to these questions?

Mr. SWINFEN EADY: May I read paragraph 4 of the prayer of the Bill, page 13b: "That the Plaintiffs may have such further and other relief as to your "Lordships shall seem meet and as shall not interfere with the possession of the "Receiver in the suit hereinbefore referred to of *Allan v. The Manitoba and North-Western Railway Company*." It excludes any such action. That emphasises more than I could hope to do what the parties were considering.

LORD WATSON: That is a Receiver of the whole line.

Mr. SWINFEN EADY: Yes, and as I have said with reference to foreclosure in the same way no questions arise with reference to any exercise by them of any power under this mortgage.

LORD WATSON: I suppose the effect of the appointment of a Receiver of the first division of the railway simply made him a Receiver from the other Receiver.

Mr. SWINFEN EADY: Yes.

LORD WATSON: The effect of the declaration as to the subtraction is as to the expenses.

Mr. SWINFEN EADY: The hand to receive the net revenue. In fact it really was a Mortgagees Bill, and as I understand practically framed on this footing. Assume for the moment that there had been no power of sale in the mortgage at all, because in our view nothing turned on it. Supposing it was a charge or a mortgage without a power of sale. Then the Plaintiffs would have been entitled, assuming there was no other objection, to come to the Court and ask for the relief of an equitable mortgage which now may be a sale by Statute. It is really asking the Court to proceed *in rem* by decreeing a judicial sale. That is what they wanted, and then the Court decreeing a judicial sale under its jurisdiction to deal with land within the Province that then they should be let in under the decree with liberty to bid. That is the prayer. That is exactly what was wanted, and as I understood from Mr. Ewart when addressing your Lordships in substance it was no good unless they had leave to bid. That altogether negatives any idea of proceeding out of Court with a view of exercising a power of sale. I apprehend it is clear if a mortgagee is selling under his power of sale he cannot sell to himself, and any such notion of exercising this power of sale was the last thing they were proposing to do.

LORD HOBHOUSE: It is only the rule of the Court of Equity—there is no law against it—to secure fair dealing. How it would be in the case of property like this I do not know. Everything is above board.

Mr. SWINFEN EADY: I do not know of any law to enable a seller to be buyer too.

LORD DAVEY: You can give leave to a Trustee to buy.

LORD HOBHOUSE: It is a rule of equity. It might be difficult to find a buyer except the Committee of Bondholders.

Mr. SWINFEN EADY: Perhaps that very difficulty is one of the difficulties which induced them to obtain an order for a judicial sale, with leave to bid. What I was upon was the frame of the action. That is what they desired. Exactly the same as if there had been a charge, without any power of sale whatever, when they might have gone to the Court and asked the Court to decree a sale.

LORD WATSON: Do they suggest any reason on the record why the power of sale given by the mortgage should be exercised through the Court?

Mr. SWINFEN EADY: No, none whatever.

LORD WATSON: You say that is not the object.

Mr. SWINFEN EADY: In my view that is outside the matter altogether.

LORD DAVEY: They allege the power of sale as a reason for having a judicial sale.

Mr. SWINFEN EADY: I apprehend that really there is no middle course in this way. If they are mortgagees with a power of sale, that is a power, they may be entitled to exercise. If there are no means of selling, they may come to the Court, but a mortgagee is not entitled to come to the Court to compel a mortgagor to sell. There is no such notion as that and I apprehend if it is suggested that they should sell, and we should concur in a Conveyance to a purchaser, the answer at once would be we have no authority to convey our line away. We have power by Statute to mortgage whatever rights follow upon that.

LORD DAVEY: Their only right to it would be under the Covenant for further assurance.

Mr. SWINFEN EADY: And when your Lordships look to the terms of that it is a very limited form. It is only a covenant to further assure to the Trustees. There is no provision for assuring to a purchaser or to persons claiming through them. It is only to assure to the Trustees or their successors in the trust and not to outsiders at all.

LORD HOBHOUSE: There is a very important part of the property as to which there are special covenants to do everything to make them an effectual security and so on.

Mr. SWINFEN EADY: Yes.

LORD HOBHOUSE: It might be that a good deal would have to be done by the Company.

Mr. SWINFEN EADY: Yes. With regard to the question of further assurance at page 82, line 39 :—"it will from time to time and at all times hereafter "and as often as thereunto requested by the Trustees under this Indenture execute, "deliver and acknowledge all such further deeds, conveyances and assurances in the "law for the better assuring unto the Trustees upon the trusts herein expressed the "said first division or portion of the railway and telegraph constructed, or to be con- "structed, together with its equipments, appurtenances and franchises," and so on, "intended or contemplated to be granted or conveyed to the Trustees or their successors "in the trusts created by these presents." Then a question was raised by my friend, Mr. Ewart, with reference to this—it is not a question raised by the Bill—but this is an explanation I think upon other matters as to why it was not raised. It was suggested that the Plaintiffs would require a conveyance of the 50 miles of line that was afterwards constructed, and that there might be some reason with regard to that.

LORD HOBHOUSE: There is no allegation in the Bill about that.

Mr. SWINFEN EADY: Not in the Bill, but there is an allegation in the record your Lordship has perhaps in your mind. It is in the petition that is set out in the Answer. On Page 24 your Lordship will see Paragraph 10 of the Petition. The answer to it is this: That that was dealt with on the Petition. There was

a consent order made on this Petition. We were willing to give that deed of further assurance, and it is never mentioned in the Bill. It was asked in the Petition specifically, and we said we were willing to give that, and the Judge made a note of the proceedings. If your Lordships look at page 25 of the Record, there is a specific prayer in the petition that leave may be granted to take proceedings to enforce the execution by the Defendant Company of a deed of further assurance of the 50 miles.

LORD HOBHOUSE: That is what I had in my mind.

LORD DAVEY: You consented to do it and it has dropped out.

Mr. SWINFEN EADY: Yes; and when you come to the Bill there is no allegation about it at all. It is a point made at the bar, but when it is examined there is no substance in it.

Then, my lords, I have nothing further to say as to the frame of the action but from beginning to end we accepted this view, that what they wanted was a judicial sale. We disputed two things. We disputed practically that the Court in Manitoba had any jurisdiction to sell the whole 180 miles. We adduced evidence to show that part of it was out of the jurisdiction of the Court. So far that was conceded, and then we said the other portion cannot be sold as a separate integer. On that we were prepared to adduce evidence, and the Counsel for the Plaintiffs objected that that was a question not raised. The learned Judge intervened, and it is the fact there was no request or application to sell part of it within the Province as a separate integer, and therefore we were excluded from showing why in any case there should be no sale of this as a separate integer. That is really the whole case. What we submit is that on both points the Court was right, and that those are the only points not only that were raised but that were deliberately intended to be raised by the parties: any question with regard to the validity of the proceeding under power of sale is quite outside, and any question with reference to incidental directions is quite outside. The Bill is framed on the hypothesis of dealing with the two matters, a judicial sale, and then the prayer is for relief only consistent with the Receiver remaining in possession, and if it was a matter of any supplemental direction that does not arise because no incidental direction was given, and also that no question arises such as Mr. Blake invited your Lordships to decide, assuming there was a sale what after a sale would be the rights of the parties?

LORD DAVEY: The terms and conditions of the portions sold and operated would be determined by the Minister.

Mr. SWINFEN EADY: Yes, if and when there is any sale.

LORD DAVEY: The purchaser could not operate without some statutory authority. He could not charge a toll.

Mr. SWINFEN EADY: No, and when the various Acts of the Manitoba Legislature are examinsd I should question as to under what circumstances within the Province there is granted any right to sell a railway. Those were all matters outside

the Record, as we say that possibly at some future time may or may not have to be raised ; but the questions that were raised here were short and simple, and we met them as they were raised, and for those reasons we submit that the Court below was right, and that their judgment should be affirmed.

Mr. BLAKE : My Lords, I am sorry that the information I have obtained with reference to the statements that have been made as to the methods pursued by the Solicitors and Counsel in this case do not altogether harmonise with what has been stated, I have, no doubt, with absolute good faith, on the other side. I do not understand from the information I have received that the decree was settled by the parties at all. The statement communicated to me is that there were matters in difference between the parties.

LORD WATSON : I do not think it is of importance whether it was settled by the parties, but the parties agreed by their Counsel that the words should represent what the Court intended to find.

Mr. BLAKE : I am going to state the information I get——

LORD WATSON : They meant not to decide the point you ask us to decide.

LORD MACNAGHTEN : The Decree speaks for itself. For my part I think it is most objectionable to refer to what took place between Counsel. It raises questions which in all probability may be very disagreeable.

Mr. BLAKE : I quite agree ; but it was impossible for me to let the statement pass without objection.

LORD DAVEY - If there is any difference of opinion between you I do not think we ought to entertain the question at all.

Mr. BLAKE : Very well, my Lord. Then there was a statement made with regard to a deed of further assurance—that there was a consent order for such a deed. That takes my learned friend, who has had the conduct of the case below, by surprise. Communications are going on at this moment which show the inconvenience of such statements being made at all in the absence of conference between the parties——

LORD DAVEY : At any rate there is this : that you did expressly ask for a deed of further assurance in your Petition for leave to institute proceedings, and that for some reason or other it dropped out, and you do not ask for it in your present Bill.

Mr. BLAKE : I know, my Lord ; but my capacity does not enable me to deal with more than one point at one time, and I am dealing with the first point to which one of your Lordships has alluded, and only stating to your Lordships that, as far as I have been able at present to gather, I cannot accept the statement that it was a consent order. I should be glad to accept it because

it would better the case from that which his Lordship has said is the other inference; and the inference I drew, on looking into the papers more fully, after my learned friend who followed had spoken, was that it was asked for by the Petition, and for some reason or other the leave was not granted—a very good reason for not asking for it in the Bill; because we could not.

LORD DAVEY: That would not interfere with the possession of the Receiver.

Mr. BLAKE: I did not say it would, my Lord.

LORD DAVEY: You say you wanted leave.

Mr. BLAKE: We thought we wanted it.

LORD DAVEY: Surely you did not. It would not interfere with the possession of the Receiver, would it?

Mr. BLAKE: We wanted to obtain a declaration and decree against this Company for the execution of a deed of further assurance for the 50 miles We asked for leave to take such proceedings. That leave was not granted. But my learned friend says it was because the parties agreed to give the deed for further assurance.

LORD DAVEY: The Court did not think it necessary.

Mr. BLAKE: I do not want to enter into these controversies, but if it had been intended to modify the statement by what occurred between the parties, it would have been better that some conference should have taken place, and a settled statement accepted by both parties presented to the Court. Looking at the record, and dealing with it, as Lord Macnaghten said it ought to be dealt with, we thought—perhaps we were quite wrong—we wanted leave to sue for this deed of further assurance. We asked for leave to sue for that, and leave was not granted; and that is the state of things in which the Record in that respect comes before the Court.

Then it is also quite correct to say that the Court below has not decided what the condition of things as to working expenses shall be after any sale at any rate of the immoveables; because there is a declaration at the foot of paragraph 2 of the decree. "But this Court does not see fit at the present to declare the rights of any parties in "respect of such priorities after any sale of the first division of the railway." Therefore it was before the Court and it was argued before the Court.

LORD WATSON: The natural reading of that Order is that they refused to give you a sale.

Mr. BLAKE: But they say, "after any sale," which must mean a competent sale. They had refused a sale, not because they thought (for they decided otherwise) that this mortgage was *ultra vires*, either in respect to the incidental right to obtain a judicial sale or in respect of the right to have a sale under the power. But it was because

they were disabled from granting relief to the Plaintiffs by reason of the 9½ miles being beyond the jurisdiction. They did give a sale by this decree of one of the subject matters. They gave a sale of the personalty——

LORD WATSON: If there had been no power to sell by the deed, the Court were not bound to assume there could be no sale, because the two portions were situated in different countries.

Mr. BLAKE: No.

LORD WATSON: In such a case the Courts of the two countries in combination can sell the whole. The Court of Province A can authorise all the line within their Province to be sold as part and portion of the mortgage, and the Court in Province B can make the same order with regard to the portion in their province.

Mr. BLAKE: Would that be one sale?

LORD WATSON: I think it would. They could order one to be sold at a certain place.

Mr. BLAKE: I am not familiar with any such procedure as that.

LORD DAVEY: Would not it be an interference with the statutory jurisdiction of the Minister to say what should be the disposition of the rents and profits?

Mr. BLAKE: Not in the least, my Lord.

LORD DAVEY: He is to define the terms and conditions on which the railway is to be run apparently.

LORD HOBHOUSE: That would be according to the contract.

LORD MACNAGHTEN: On the construction of the deed.

LORD MORRIS: I do not think there is any controversy at all on that. The deed is one thing, and the Minister might take a different view.

Mr. BLAKE: Perfectly. I have pointed out that I am subject to the possibility that the purchaser, no matter what declaration your Lordships might make——

LORD WATSON: We could make no declaration generally. We could only make a declaration on the construction of that document.

Mr. BLAKE: Precisely.

LORD WATSON: The document might be waste paper for all I know.

Mr. BLAKE: And the Minister might say it is for me to determine on what terms I will give you a franchise. That does not interfere with your Lordships' judgment.

LORD DAVEY: It is not for the Court to say what shall happen after the sale if the Minister has it in his power.

Mr. BLAKE: What the Court has to do is to determine what that thing is which by the contract of the parties was saleable.

LORD MORRIS: Your opponents say without the intervention of the Minister you have not the right under the deed. We do not approach the question of the Minister until the construction is in your favour. Then if the construction of it is against you the question never could arise.

Mr. BLAKE: I agree. For my part I have assumed that the view was taken on this record that it was impossible to effect a sale of this subject matter without a determination of what the subject matter was composed of; that without that a sale was absolutely impossible; and without reiterating it—because it has been stated from the Bench in language more forcible than I can use—I ask your Lordships to adopt that view, and if that be the view, I ask your Lordships that instead of permitting the last two lines of the second paragraph of the decree to stand, "that the Court does not "see fit at the present to declare the rights of any parties in respect of such priorities "after any sale of the first division," your Lordships should determine what the rights of the parties would be after such a sale, so that a sale may be made possible. If it be the case that a sale, without a judicial determination of this point is under the circumstances of this case an impossibility—and I may quote my learned friends language upon that, because he said none but a fool would buy——

Mr. ROBINSON: Either with or without the declaration.

Mr. BLAKE: As things stand, no one but a fool would buy. My learned friend, knowing the railway so well, thinks, even after a declaration favourable to us, no one but a fool would buy. But, at any rate, the fools, if they had intellect enough to understand anything, would know what they were buying, and perhaps they might be more or less reluctant to enter into the market; but what I say is that we have it confessed practically by the other side that no one but a fool would buy under the existing conditions of uncertainty.

LORD DAVEY: You do not mind whether your purchaser is a fool or not, as long as you get a purchaser at a sufficient price.

Mr. BLAKE: I do not expect to get such a rank fool to buy as my learned friend suggests is the only kind of fool who is to be in the market, that is to say, a fool who will buy a law suit instead of buying a section of a railway.

LORD HOBHOUSE: The difficulty put in your way by Mr. Robinson's argument is that you have not raised the question in your pleadings, and it ought to have been properly raised and discussed in the Courts below before this Tribunal can pronounce an opinion on it. It is a preliminary difficulty entirely.

Mr. BLAKE: I submit to your Lordships that it would be extremely unjust so to deal with the pleadings on this point. What raised this difficulty? It was the fact that, without pleading any fact in the course of the evidence, the Defendants set up and got out the fact that the line of railway ran 9½ miles beyond the boundary. There were no pleadings for that. There was no statement, but the fact was got out at the hearing that it ran beyond the boundary; but for that there would have been a decree for sale. It was consequent upon that circumstance being introduced into the case in that way, and without amendment of pleadings, and without objection taken by any one, that the Plaintiffs suggested to the Court, if we cannot sell the 180 miles we are entitled to sell the 170½. The suggestion was not made till then, and would have had no force till then. It grew naturally and obviously only out of the suggestion that there was a difficulty in selling the whole section. Then in the same way that difficulty was raised at that time and without pleading on the part of the Defendants that a part of the railway was out of the jurisdiction; and it is that circumstance which creates the imperfections in the pleading otherwise; and to say that the Defendants are to be entitled to succeed without having pleaded that there is a part of the railway outside the jurisdiction, and that therefore that particular form of relief cannot be granted and then that we are to be prevented, because we did not plead to answer that contention and ask specifically by pleading for the minor relief which might be required in some other form, only because of the new difficulty suggested without pleading—to say that, when the parties are here, the question is here, and the subject is here, this matter cannot be brought forward just because there an amendment was not proposed to the pleading and leave formally asked from the Court, seems to me to be going a very long way.

LORD MACNAGHTEN: As far as I can see there is no suggestion in either of the Courts below that a sale out of Court was contemplated by you under any circumstances.

Mr. BLAKE: Oh, yes; a suggestion on the pleading.

LORD MACNAGHTEN: No, not on the pleading, but before the Court in the argument, as far as I can gather from the Judgment. I think this has been raised by you before the Board for the first time, as far as I can gather.

[Adjourned for a short time.]

Mr. BLAKE: My Lords, it was suggested that there was no indication in the proceedings of any idea of using at all the power of sale apart from the Bill.

LORD MACNAGHTEN: No indication in the Bill.

Mr. BLAKE: I thought there was;—but I am going to show your Lordships first of all an indication beforehand in the order on the Petition itself, at page 26 of the record, which gives liberty to file a Bill praying that the premises be sold, and that a Receiver be appointed. It is paragraph 3: "And this Court doth further order that "the Petitioners be at liberty if they so desire to take proceedings for the sale of the "said premises or any part thereof under or in pursuance of any power which they may "have under the said security."

LORD DAVEY: That is the order on the Petition.

Mr. BLAKE: Yes.

LORD SHAND: And that was not done.

LORD MACNAGHTEN: That remains.

Mr. BLAKE: That remains.

LORD DAVEY: Nothwithstanding the appointment of the Receiver.

Mr. BLAKE: Yes.

LORD DAVEY: That order was made on appeal.

Mr. BLAKE: Yes. The Petition was dismissed originally. The Court of first instance seemed to think they ought to try the case practically on the Petition for leave, and they tried the case and dismissed the Petition. The Court above took a more modified view and heard the case, and only allowed a Bill to be filed for those things they thought the Plaintiffs would apparently succeed in, instead of the preliminary proceedings, as a mere precaution to prevent a contempt of Court and to avoid absolutely frivolous and vexatious proceedings. That is the whole miscarriage, and so there has resulted from the limited character of the leave a good portion of the difficulty with which the Plaintiffs have been beset ever since.

Then the Bill does, as I pointed out formerly, first of all set out the power of sale, and does also state at paragraph 18 the fact which gives rise to the right to sell under the power, namely, that twelve months have elapsed since the first of the defaults, an allegation relevant only to that question, and then at paragraph 21 it says this: "The Defendants deny the validity of the said bonds and pretend that the said Indenture was *ultra vires* of the Defendants, and they deny the right of the Plaintiffs to sell the "said first division of the said railway and the said Defendants will not unless compelled "by this Honourable Court give possession to any purchaser of the said first division. "Owing to the antagonistic position of the Defendants, and for the reasons elsewhere "in this Bill set forth, the Plaintiffs show that a sale of the said first division could not "be so effectually made otherwise than under the direction of the Court." Then having, as I have said, stated the power, and that the Plaintiffs were mortgagees in trust, it asks in the second paragraph of the prayer, "That all the property described "in and included under the said Indenture may be sold under the direction of this

"Honourable Court, and that the Plaintiffs may have liberty to bid at such sale," which, having regard to the allegations on which the pleading is based, I should venture to submit was wide enough to include either method of reaching the conclusion that there should be a sale.

Then, as to the question which the Court reserved, or rather which they did not think fit at that time to determine, your Lordships will see the extreme difficulty in which the Plaintiffs are placed by that declaration. When is that to be declared? In what proceeding is that to be declared? What proceedings are we at liberty to take to obtain the declaration if we cannot now obtain it? If this decree is affirmed in all respects, it affirms also the propriety of not directing the declaration at this time of the rights of the parties in respect of any priorities as to the sale, and thus closes the door to any relief.

LORD SHAND: It may be with regard to this particular demand for sale they think it better to say nothing.

LORD HOBHOUSE: If the question is properly raisable by Bill, and you presented a Bill saying we desire to proceed to sell, but the Defendants raise questions which render it practically impossible to sell, and we ask the Court to construe the contract, the Court will construe the contract.

LORD DAVEY: There is a cloud to be removed from your title.

Mr. BLAKE: I was taken by surprise by the statement that the subject had not been discussed. I have here, if your Lordships wish for information on the subject, a copy, verified by affidavit, of the notes of the learned Judges on the argument of the case, which shows that the subject was fully discussed as to the rights after sale as well as before sale, and what happened seems to have been an adjudication that it was not fit at the present moment to decide the rights of the parties.

Mr. ROBINSON: What are those notes?

Mr. BLAKE: "Division of earnings; parties are all before the Court for "decision of this question. Made in terms of the mortgage itself; Mr. Ewart, applica- "tion of earnings; does the purchaser take the property, &c., &c.

[*The learned Counsel read the passage.*]

LORD MACNAGHTEN: What are you reading from?

Mr. BLAKE: From a verified copy of the notes of the Judges themselves of the argument before them.

LORD MACNAGHTEN: I must say I should be sorry to make an affidavit to verify my notes.

Mr. BLAKE: I submit that the very fact that the Court has stated that it does

not see fit at present to make a declaration, indicates that that was a subject discussed before it, and on which in the exercise of its judgment it had thought fit not at that time to make a declaration ; and all the parties being before it, all the facts being before it, the question being a question of law, and the circumstance which gave rise to the whole difficulty being, as I have already stated, that at the trial of the cause the question is suddenly started that there is a difficulty owing to the fact that is divulged that 9½ miles are beyond the boundary, the pleadings ought to have been so amended or treated as so amended——

LORD WATSON : I see you complain in your Bill, paragraph 24, that they were deducting expenditure on other parts of the line from a section of which you had a Receiver, and I have no doubt it is a general complaint. You were complaining they had no right to deduct it at any time.

Mr. BLAKE : Yes.

LORD WATSON : It does not seem unreasonable for a Court to decline to order a sale till it was thought necessary to decide that point.

Mr. BLAKE : It was, inevitably, one of the issues tendered and intended to be tried because the Plaintiffs asked for a sale. They came to the Court hoping to get a sale, and they would have succeeded in getting a sale on the pleadings, according to the view of the Court, because the Court thought the mortgage was a charge.

LORD SHAND : If you got an Order for a sale I do not see how the Court could have proceeded to tell what was the result of that, much less if you did not get the Order for sale.

Mr. BLAKE: The Judgment itself contained an indication that the prime reason why the Court did not at that moment declare the rights after a sale was because the Court had found that in that process and in that suit they were not going to decree a sale. But the issues tendered originally in these pleadings must have contemplated there should be such a decision because the suit asked for a sale.

LORD SHAND : A sale by the Court. I quite understand you were in rather a difficulty, but that you really did not know it before.

LORD WATSON : The Court did not mean to say it was proper for them to declare what the meaning of the contract was with reference to a condition of matters after the sale, if there was no sale or imminent probability of a sale.

LORD MACNAGHTEN : You did not ask for any amendment, if it did come upon you by surprise.

Mr. BLAKE : I have no record of what occurred and I am not informed. The other side did not ask for any amendment as to Langenburg and the 9½ miles.

LORD DAVEY: It is not necessary where there is an objection which ousts the total jurisdiction of the Court. Where it is not a mere dilatory plea which can be cured by amendment, but it is one which goes to the root of the jurisdiction of the Court it is not necessary to plead it.

LORD WATSON: The want of jurisdiction arose from the fact. To my mind it was clearly the duty of the Court, when the plea of no jurisdiction presented itself, to take notice of it.

LORD DAVEY: The Court was bound to take notice of it.

Mr. BLAKE: I think that is so, when the Court finds, as your Lordship says, not a dilatory plea of no jurisdiction in one Court of the country acknowledging a jurisdiction in another Court of the same country, but a plea that there is jurisdiction whatever in any Court of the country, which is a more valid sort of objection.

LORD DAVEY: They need not plead it.

Mr. BLAKE: I think that is a different proceeding, but I think that the Plaintiffs may fairly say that where a fact which raises the question of a total want of jurisdiction is not stated by the Defendants at all, and it is elicited at the Bar, a reasonable degree of latitude with reference to the construction and amendment of the whole record, and to the position of the parties ought to be allowed.

LORD DAVEY: If you had asked for leave to amend in the new state of circumstances, I think you ought to have got it.

Mr. BLAKE: The difficulty is this: I do not know how it is here, but in the Province in which I used to practice (and my learned friend tells me it is the same in Manitoba) the rule having become so inevitable and so inexorable that amendment will always be granted, there is very little discussion about amendments, but if the parties are there, and the evidence is there, and the question is there, the questions are raised without amendment. I agree the practice is very loose, and may oftentimes give rise to difficulty.

LORD WATSON: Amendments are often made by the Court below, and very properly, with considerable facility, but I do not think these facilities have ever been given here.

Mr. BLAKE: No, my Lord.

LORD MORRIS: How can an amendment be made unless it is asked for? The Court says you shall make any amendments that are necessary. It is very wide, but they do do it.

Mr. BLAKE: We have gone further, and knowing amendments will be granted, and knowing the important question of costs is not involved—because you

cannot get a second Counsel's fee and Solicitor's fee—the truth is the formal change in the Record to fit the facts, if the facts are got out, and the parties are there, is generally omitted.

LORD MORRIS: At the end of the case in the Court of First Instance it behoves the person in whose favour the amendments are made to have them made, and he does not go to appeal without their being made.

LORD WATSON: The facility in getting amendments made in the Courts below is not in favour of our taking up any case and dealing with the case as if it had been amended.

Mr. BLAKE: I am afraid I have failed to express myself clearly——

LORD SHAND: You mean people believe they are amended though they have not done it, it is such an easy business.

Mr. BLAKE: I agree.

LORD DAVEY: If you showed the question had been discussed and determined in the Court below, notwithstanding the pleadings had not been amended, I do not think there would be any objection to this being determined here.

LORD HOBHOUSE: Is it your suggestion that the parties went on as if they had amended their Bill by praying the alternative relief that the contract should be construed so as to enable you to sell?

Mr. BLAKE: The argument was enlarged as I am instructed, and I can only say what I am instructed. It so proceeded and the discussion took place; no objection was taken, as I am instructed, to the fact that the pleadings did not fit the argument. The Judgment of the Chief Justice certainly speaks generally and broadly, and does not seem to have made much distinction between one and the other, but all the language of the Judgment is general; and it is only when you come to the modified form in which it is given expression to in the decree that you find a determination there, of which you see no trace in the Judgment itself, not to declare at the present time the rights in respect of these priorities after any sale.

LORD HOBHOUSE: The Chief Justice does not discuss at all the effect of Articles 2 and 3.

Mr. BLAKE: Yes, I think so.

LORD HOBHOUSE: He certainly would have discussed that elaborately.

Mr. BLAKE: Your Lordships see, as has been observed from the Bench, the

parties seem to have thought that the situation of things under the Receiver was analogous to the situation of things that would have taken place under Article 2.

LORD HOBHOUSE: Article 2 is referred to as throwing light on the words in the operative part of the deed, but there is no where any discussion as to the meaning of the Article. supposing an entry had been effected, and I do not think there was any discussion of Article 3 at all.

LORD MACNAGHTEN: Instead of filling it in for liberty to sell under this power, which you already had, and selling in the exercise of that, you contested the point whether the Court had or not authority to sell. The whole of the argument seems to have been devoted to that as far as I can gather from the Judgment.

Mr. BLAKE: I should have said that the language which is to be found at pages 60 and 61 of the Judgment of the Chief Justice indicated that there had been a larger discussion on that point; and your Lordships will observe that the *ratio decidendi* was that the mortgage deed depended for its authority on the original Act; that the original Act did not warrant a limitation of the charge for working expenses to those of the division, and that therefore the provision was *ultra vires*. That applies, of course, to the whole. It diminishes the necessity for dealing with one class of circumstances under which there could be a separation and a different class of circumstances; but they generally determine that. They determine therefore that the subsequent Acts did not validate the mortgage so as to render it good in form, that it remained on its prior statutory authority; its power depending on the first Act which had been passed before it had been executed; and under that Act it was impossible to make the division or limit the charge as the mortgage deed had done. That seems to have been the position of the Judges. "That Act," says the learned Judge, at page 60 line 12, "gave the Company power to issue bonds for the purpose of "raising money for the prosecuting of their undertaking, and they were empowered to "secure these bonds by a mortgage deed creating such mortgages, charges and encum- "brances upon the whole, or any part of the property, assets, rents and revenues of the "Company, present or future, or both, as shall be described in the deed, 'but such "'rents and revenues shall be subject in the first instance to the payment of the "'working expenses of the railway.' The 46 Victoria chapter 68, s. 5, authorised the "issue of bonds which should constitute a first mortgage and privilege upon the under- "taking, and upon the railway constructed, and to be thereafter constructed, and upon "the property of the Company acquired, or which might be thereafter acquired—ex- "cepting therefrom municipal bonuses—and upon the tolls and revenues derived from "operating the railway, 'after deducting from such tolls and revenues of working "'expenses.' And provision was made for securing the bonds by mortgage "deed upon the whole or any part of the property, assets and revenues of "the Company present or future, or both, as shall be described in the deed, 'but such "'revenues shall be pledged in the first instance to the payment of the working expenses "'of the railway.' The words used in these sections in their ordinary and natural "meaning apply to the entire railway then constructed, or which the Company had "power to construct thereafter. I do not see how they can be limited to a portion only "of the railway which may be described in a mortgage deed. Turning now to the

" mortgage." Then he proceeds to discuss the meaning of the mortgage, and point out that the " said railway " must be taken as the whole, because in the paragraph in which it is used, the first division is used in the three preceding parts, and then you find " the said railway," and then he gives the argument on the other part of the deed, to which reference has been more than once made. " The Plaintiffs argue that the " language used in the second article explains the meaning of that used in the " earlier part of the deed. That article empowers the Plaintiffs, in the event of " default "——

LORD SHAND : I do not see the object of reading all this.

Mr. BLAKE : I am desirous of showing that the judgment indicates that there was discussion of the question of working expenses——

LORD SHAND : I do not think you need argue about that. The judgment deals with it.

Mr. BLAKE : Yes ; but after being argued the judges determine that they will not deal with the portion which it was really material to us to have dealt with.

LORD SHAND : That is another matter altogether. They have dealt with it so far as your case raises it.

LORD WATSON : They have not dealt with the point that was not raised ; but in view of their own decree and the other parts of the case it has become necessary to dispose of it, namely, that the sale was not limited.

LORD SHAND : And the question was whether that was their proper course to take in the position in which the case now is.

Mr. BLAKE : Of course, if that course is taken, what it means is that the parties have to begin again in some way or the other.

LORD SHAND : Because of the way in which this case is unhappily shaped. It is a misfortune.

Mr. BLAKE : Of course, I will not say the reason why. The parties have to begin again, and that in a case in which the parties are here, and in which the question is really open, and the deeds and Acts of Parliament are all here.

LORD DAVEY : I do not think there will be any more litigation.

LORD WATSON : The view submitted to us, and there seems to be some foundation for it, is that the Court has not been asked to construe the part of the contract that gives you a power of sale.

LORD MACNAGHTEN: They have got that already.

LORD DAVEY: They have already got leave to proceed by their power of sale.

LORD WATSON: It is nowhere averred that the controversy had arisen, or the dispute had arisen between the parties as to the proper construction of that power of sale.

Mr. BLAKE: Yes, it was stated in the Bill. The paragraph has been read. It is paragraph 21, page 13. The Defendants "deny the right of the Plaintiffs to sell "the said first division of the said railway, and the said Defendants will not, unless "compelled by this Honourable Court, give possession to any purchaser of the said first "division."

LORD DAVEY: And therefore you ask for a judicial sale.

Mr. BLAKE: Of course I do not reiterate my position. Your Lordship has construed the latter part of that paragraph as meaning a judicial sale. I have stated all I have to say for the other construction, or for a construction that would include any kind of sale.

LORD MORRIS: Certainly they dispute it to-day, and probably did so then.

Mr. BLAKE: With regard to my Lord Davey's observation that he does not expect there will be more litigation, I do not see how it is possible to avoid litigation in view of the present position of the case I do not see how it is possible by any means to avoid this proposition that the decision to which your Lordship's Board appears to be disposed to come as to the impossibility, with propriety, of this Court dealing with this question on these pleadings, means that there must be other proceedings in order to arrive at a determination of that question before there can be any effectual sale at all. It is quite out of the question, in my view, that my clients can realise their security till they get a judgment, which probably must be a judgment of this Court, to that effect, and therefore of course I do not say it is a reason against the conclusion, but it is as well to face the consequence. The consequence of such a determination to this case must be that at some future day this same question must come before your Lordships for solution upon other pleadings. I do not feel that I can usefully trouble your Lordships further on that point, but I desire to say a few words with reference to my learned friend's argument, and to the one quotation he made on the subject of the jurisdiction. My learned friend referred to *re Hawthorne, Graham* v. *Massey.*

LORD MACNAGHTEN: I think he was stopped on the jurisdiction.

LORD HOBHOUSE: It was on the point of the partial sale.

Mr. BLAKE: I am not going to detain your Lordships many minutes, but I understood my learned friend to have argued the question of want of jurisdiction to sell the whole section.

LORD SHAND: He mentioned the case of *re Hawthorne* as one of the same class. I do not think he put it higher than those which the learned judge referred to.

Mr. BLAKE: All that I wish to do is to read a few sentences of the Judgment which I had extracted before my learned friend mentioned it, and which I abstained from reading because I hoped that I should not be called upon to trouble your Lordships with it. But I should like to read it now, as my friend has referred to the case. "This is no question of contract," Mr. Justice Kay says, "but simply one of the "right to succession to foreign lands." That is the way the learned judge states the "case. It is obvious that neither Charles Stewart Hawthorne nor the Defendants is or "are, with reference to this claim, by English law in any fiduciary relation to the "Plaintiffs. They are not bound by contract with them. Nor is the claim in any way "based upon a suggestion of fraud. It is a bona-fide claim on both sides of title to "land, or the proceeds of land, in Saxony. The claim depends primarily upon the law "of Saxony as to the devolution of land in that country." Then he says: "I am "not aware of any case where a contested claim, depending upon the title to immoveables "in a foreign country, strictly so called, being no part of the British dominions or "possessions, has been allowed to be litigated in this country simply because the "Plaintiff and defendant happened to be here." It was a succession; no contract; no trust; no contractual relation at all; and it was proposed to litigate the question here who was the heir-at-law entitled to land in Saxony according to the law of that country. That was the question in that case.

LORD SHAND: It would have required evidence of foreign experts.

Mr. BLAKE: Yes, and it would have gone altogether beyond our case here. So that I extracted these passages expressly ~~to~~ show your Lordships that the lines of distinction the learned Judges take were lines of distinction that favour the exercise of jurisdiction where there is contractual relation, whether it be a relation in the form of trust, or a relation in the form of contract or agreement; and therefore I say that Hawthorne's case does prove my contention.

LORD WATSON: What was asked was a decree which would have been a part of the title to the land, and would have established what is termed a *jus in re*.

Mr. BLAKE: What was asked was a determination in an English Court of what the law of succession in Saxony was.

LORD SHAND: To complete the title.

Mr. BLAKE: There being no contract at all between the parties. The Court was asked to decide who was entitled as heir-at-law under the law of Saxony to this estate.

LORD WATSON: In other words it was asked to determine who was at the time according to the law of Saxony there the heir to the estate.

Mr. BLAKE: And that without any question of contract whatever. But the Court decides against interference upon the ground that there is no privity of contract, thereby showing that their view was, that if there had been privity of contract, there would have been jurisdiction, as I have shown in several cases which I cited. Then my learned friend said that the Moçambique case settled the matter. I can only repeat that my argument is that the Moçambique case proves the contrary. That the distinction there taken is a line of distinction with which I have not quarrelled, and it is not necessary to quarrel—a line of distinction which establishes that where in any suit privity of contract exists it imports jurisdiction.

My lords, under there circumstances, I hold that the judicial sale, if this is to be put as a judicial sale, is not the whole; that what is asked in this case is a mortgage decree, and if your Lordships impose on me the disadvantages of treating this not as a case for execution of the power, your Lordships must give me such advantages as belong to the other class of case, and the advantages belonging to the other class of case are these, that the order must be an order for an account to be taken, for an ascertainment of the amount due by the Company, for payment within a certain time, within six months by the Company; and in default of that a sale. That is the mortgage case. About all the prior part of that there can be no complaint. This is a contract under which money is due; a contract in respect of which an account is to be taken; a contract which entitles me to an order for payment; and then in case of default to a sale of the premises, which I submit is to be made good by the execution of the Deed to which the Company is a party. And thus my clients and the company being within the jurisdiction of the Court the case is one *in personam* and not *in rem*. That is the submission I make with the brevity which is due from me to the Court at this stage of the argument on the question of jurisdiction. Again I am met with this, that there was nothing in the Appellants' case based on this view, but I would submit to your Lordships that there is enough in paragraphs 19 and 20 of the Appellants' case at page 8 which states:—"(19) The Court of Queen's Bench in "Equity for Manitoba has the same equitable jurisdiction over persons within "its personal jurisdiction with respect to land situated without its territorial juris- "diction as is exercised by the Chancery Division of the High Court of Justice in England, "and can by the exercise of such personal jurisdiction enforce a sale of and the execution "of trusts affecting land, situated without its territorial jurisdiction in the same manner "as the said Chancery Division. (20) The Appellants contend that the first division "of the Respondent Company's railway is a section of a railway capable of being sold "under the laws with respect to railways in force in the Dominion of Canada, and is a "section within the meaning of Section 278 of the Dominion of Canada Railway Act "(51 Vic. c. 9), and that it is competent for the Court of Queen's Bench in Equity for "Manitoba as a Court of Equity to decree a sale of the first division in accordance with "the terms of the trust deed of the 16th April, 1886, notwithstanding the fact that 9½ "miles of such first division are situated outside the Province of Manitoba." Then the second reason is: "Because the fact that 9½ miles of such 180 miles is without the Province "of Manitoba is no bar to the right of the Appellants in the circumstances above set "forth to have a sale decreed by the Court of Queen's Bench in Equity for Manitoba, "inasmuch as there is a contract between the Appellants and the Respondent Company,

" both of whom are subject to the jurisdiction of the said Court, and the said Court by " acting as a Court of Equity on the persons or Corporations within its jurisdiction can " enforce a sale of the whole of the said first division." Then the 5th reason is : " Because if the said first division is ordered to be sold by the Court, any " other construction than the above of the said trust deed and special Acts would " be to render the said first division practically unsaleable." So that I submit the Appellant's case does sufficiently indicate the contentions which I have been desiring to make before your Lordships.

LORD HOBHOUSE: Their Lordships will reserve their Judgment.

The foregoing is an accurate transcript of our shorthand notes.

MARTEN, MEREDITH & HENDERSON,

13, New Inn, Strand, London, W.C.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of F. D. Grey and another v. The Manitoba and North-Western Railway Company of Canada, from the Court of Queen's Bench for Manitoba; delivered 6th March, 1897.

PRESENT:

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
LORD DAVEY.

[*Delivered by Lord Hobhouse.*]

The Appellants, who were Plaintiffs below, contend that they are entitled to a decree for sale of a section of the Defendants' line of railway and telegraph. This has been refused by the Court of Queen's Bench in Manitoba, whose decree is under appeal; and the questions before this Board are: first whether the Court was right in such refusal; and secondly if it was, whether the Plaintiffs are or are not entitled to other relief in this suit.

The line in question was commenced under powers conferred by the Manitoba Legislature within that province. In the year 1882 it became a Dominion Railway subject to the exclusive jurisdiction of the Dominion Parliament; and Acts of Parliament have been passed for the extension of the line into the North-West Territory beyond the limits of Manitoba. In the years 1882, 1883, and 1885, the Company obtained powers to issue mortgage bonds upon the whole or part of their line, not exceeding £20,000 per mile according to the state of their works. In pursuance of those powers the Company issued bonds, which in the year 1885 were cancelled, and were replaced by fresh issues now in existence.

The instrument on which the Plaintiffs found their claim is a mortgage dated the 16th April, 1886. At that time the Company had power under an Act of 1883 to secure their bonds by mortgage of the whole or any part of their property, assets and revenues, subject to the condition that their revenue should be pledged in the first instance to the payment of the working expenses of the railway. They had then constructed 130 miles, and had placed 50 more under contract. That length of 180 miles is called the first Division or portion of the railway, and has been at work for some years. The bonds were a series of 5,400, each of the nominal value of £100; equal to a charge of £3,000 per mile of the first Division. They bear on their face that they are secured by the mortgage in question.

By that mortgage the Company grant to the Plaintiffs : first, the first Division of the line, with all rights and properties used for the construction, maintenance, and operation of that Division ; secondly, the plant specified in a schedule, and all other plant then or thereafter acquired for the purpose of constructing or working the first Division ; thirdly, the revenues of the first Division, subject to (among other things) the working expenses "of the said railway and telegraph;" and fourthly, incorporeal rights connected with the first Division. A number of special provisions are contained in 19 articles, of which only three need be referred to now.

By Article 2, if default is made in payment of interest for three months, power is given to the mortgagees (called the Trustees) to enter upon the mortgaged property to operate and to conduct the business of the first Division. After deducting the expenses of operating that Division, and other deductions there specified, the Trustees are to apply the money in payment of the bonds.

By Article 3, if the default continues for 12 months, power is given to the Trustees, either with or without entry, to sell the mortgaged property, and after deducting the expenses incurred by the Trustees in operating and maintaining the "said railway and premises," and other deductions, to apply the residue in payment of the bonds.

By Article 18 the Company covenant to pay the interest of the bonds, and for that purpose to apply the net earnings and income derived from the mortgaged Division.

By an Act of Parliament passed on the 2nd June, 1886, it is enacted that as soon as the prior bonds have been surrendered and cancelled, the bonds secured by the mortgage of the 16th April shall be ratified and confirmed, and shall be the first lien and charge on the first Division of the railway as provided by the said mortgage deed.

By another Act of Parliament passed in the year 1893 it is enacted that securities issued by the Company, among which the bonds and mortgage are specified as affecting the first Division, shall remain the first preferential claims and charges upon the respective portions of the Company's undertaking or property affected or charged as security for payment in each case, and according to the tenor and effect of any by-law, or of any deed of mortgage, conveyance, or assurance, in each case.

The Company have not been able to meet their obligations, and in June, 1893, a Mr. Allan and others, judgment creditors of the Company, filed a Bill praying for the appointment of a Receiver. On the 8th June, 1893, Allan was appointed Receiver of the undertaking and assets of the Company until the hearing, and he was ordered to provide for the working expenses of the Railway and other outgoings and repairs. That order was substantially continued at the hearing of the cause on the 13th July, 1893.

On the 3rd July, 1894, the Plaintiffs filed the Bill in the present case, praying as follows :—

"1. That the Defendants may be ordered to discover what personal property is now embraced in "or included in the security referred to in this Bill, namely, the Indenture of sixteenth April, 1886.

"2. That all the property described in and included under the said Indenture may be sold "under the direction of this Honourable Court and that the Plaintiffs may have liberty to bid at such "sale.

"3. That a Receiver may be appointed of the revenues, tolls, and profits of the first Division of "the said railway, and that the same may be applied in payment of the amount secured by the bonds "hereinbefore referred to.

"4. That the Plaintiffs may have such further and other relief as to your Lordships shall seem "meet and as shall not interfere with the possession of the Receiver in the suit hereinbefore referred to of "Allan *v.* The Manitoba and North-Western Railway Company."

It seems that by some interlocutory order a Receiver was appointed.

At the hearing before Mr. Justice Killam it was shown that of the 180 miles of the first Division 9½ miles lay in the North-West Territory; and the questions were whether a sale should be ordered either of the whole Division or so much thereof as lies within the limits of Manitoba, and whether there should be a Receiver of the revenues of the first Division, and if so upon what terms. That learned Judge held that nothing less than the entirety of the Division was saleable; and the soundness of that opinion, which was shared by the Court of Appeal has hardly been disputed at this bar. He further held that, though the Manitoba Court could not conduct a sale outside the province, it could properly, especially as the Plaintiffs are Trustees, take notice that they had a valid power of sale extending to the whole first Division, and give orders for their protection and assistance. He felt no difficulty about continuing the Receiver.

By his decree dated 17th April, 1895, he continued the Receiver, and ordered him to apply the revenues received in accordance with the terms of the mortgage except so far as it directs payment of moneys to the Plaintiffs, which moneys were to be paid into Court. He directed an enquiry as to the personal property included in the mortgage, and ordered that all necessary enquiries be made, accounts taken, costs taxed, and proceedings had, for redemption or sale. He made the usual mortgage decree for payment and redemption; and then went on to give directions "in the event of a "sale." He declined for the present to decide whether the Company was entitled to charge the working expenses of the line against the revenues of the first division.

The wording of this decree is very peculiar. Apparently it is intended to avoid the difficulty arising from part of the land being beyond the jurisdiction of the Court, by not ordering a sale in terms but leaving it to take effect under the power. It has however, been treated in the subsequent stages of the litigation as being substantially a decree for a judicial sale; and it is not easy to treat it otherwise. The Company appealed from it on this ground. They also appealed on the ground that a Receiver ought not to be appointed, or if appointed, should at least receive nothing till after payment of the working expenses of the whole line.

The Court of Appeal held that the first Division is a section of the railway which by the law of Canada is capable of sale; but that it must be sold in its entirety,

and that the Manitoba Court could not do that for want of jurisdiction in the North-West Territory. They further held that it was right to continue the Receiver of the revenues of the Division, but that he must take subject to the working expenses of the entire line.

By their decree dated the 10th February, 1896, they reversed the decree below so far as it directs a sale of any portion of the Defendants' property other than the personal property. They then made an order respecting the charge of working expenses, the terms of which are open to some exception as being capable of an extension wider than was meant. But they need not be minutely discussed now, because the Company do not ask anything more, or allow that the decree gives them anything more, than the right to deduct the working expenses of the railway from its receipts before handing anything over to the Receiver of the revenues of the Division.

To dispose of this point at once, their Lordships are of opinion that as long as the line is worked as a whole, the terms of the mortgage make it clear that the revenues of the first Division are subject, along with the other revenues, to the working expenses of the whole line. Different considerations would arise if the mortgagees were to enter and operate under Article 2 of the mortgage, or to sell under Article 3; parts of the deed which did not enter into discussion before the Court of Appeal. But the appointment of a Receiver of the revenues does not disturb the entirety of the management, and it leaves the entire revenue subject to the entire charge. Therefore with an alteration, which perhaps is only verbal, for the purpose of avoiding the construction objected to by the Plaintiffs and disclaimed by the Company, their Lordships assent to the order relating to the Receiver.

As regards the question of sale, the decisions, both English and Transatlantic, which bear on the jurisdiction of Courts of Justice to deal with foreign land, have been very carefully discussed in the Courts below. It is hardly necessary to go into that discussion again here. The thing asked for by the Bill is a judicial sale of land partly within and partly out of the jurisdiction, as an entire thing, and with specific directions by the Court. It is impossible to do that; the decree of the Court below does not do it directly, and it has been hardly more than suggested at the bar that there is any principle or authority to justify it. The two reasons urged for supporting the decree of the First Court are of a different nature.

One is that the Plaintiffs are Trustees and are entitled to the aid of the Court in administering their trusts. But this is not a suit for the administration of the trusts; it certainly could not be made so unless the beneficiaries were represented separately from the Trustees. The Plaintiffs sue as mortgagees to enforce their mortgage; and the fact that they are Trustees cannot give them any larger rights against their mortgagors, or any larger jurisdiction to the Court, than if they were sole owners.

The other reason is that, inasmuch as the Company is subject to Manitoba jurisdiction, it may be ordered to effect that sale which the Court cannot effect. But the Company have not contracted to sell, nor have they the power to do so; nor did the Bill or the decree of the First Court contemplate such a thing. The Company,

purporting to act in pursuance of statutory powers, have granted a mortgage containing a power of sale for the security of their creditors, and that mortgage has been recognized by statute. How far each portion of the mortgage is actually supported by statute, appears to be a question still in dispute; for Mr. Robinson, on behalf of the Company, disputes the validity of the power of sale which they purported to confer; and as their Lordships were for the reason to be presently stated unwilling to hear his argument, they decide nothing about it. Supposing it to bind the Company, it is quite a different thing from an undertaking by them to effect the sale themselves.

The result is that their Lordships concur with the view taken by the Court of Appeal on the question of sale. But then it is contended that if the particular form of relief asked for by the Bill cannot be granted, it is still open to the Court to grant substantial relief by way of affirming and construing the deed of mortgage, and so enabling the mortgagees to resort to their remedies in an effectual way. The Company, it is said, resist an entry. They are now denying that there is any power to sell. They raise questions with reference to working expenses which are calculated to damage the chances of a sale. Let us at all events have such questions as these cleared up by declarations of the Court before we attempt to enter or to carry our property into the market.

In the course that the litigation has taken the Courts below have not dealt with these questions; but it may be assumed for the present purpose that under proper circumstances a suit might be framed and sustained for the now suggested relief. The Respondents make the preliminary objection that this is not such a suit, and that it can only be converted into such a suit by amendments, which ought not now to be allowed. To determine this matter it is necessary to examine with some care the course of proceedings in the lower Courts.

It has been mentioned that in the year 1893 Mr. Allan was appointed to be Receiver of the undertaking, assets, and property of the Company. The consequence was that the Plaintiffs could not take steps to enforce their mortgage except at the peril of committing a contempt of Court. In November, 1896, they presented a petition for leave to take proceedings. In that petition they stated the non-payment of interest, and that they had demanded possession of the first Division which the Company had refused. They prayed as follows:—

"1. That leave may be granted to them to take such proceedings in this Honourable Court as "they may be advised for enforcing their rights to enter upon possession of the said first Division or "180 miles of railway and the other property conveyed to them under the said Indenture and to obtain "possession thereof.

"2. That leave may be granted to your Petitioners to take such proceedings in this Honourable "Court as they may be advised for the appointment of a manager and receiver, or for such other redress "as they may be advised, and also for a foreclosure of the mortgaged premises.

"3. That leave may be granted to your Petitioners to take such proceedings in this Honourable "Court, as they may be advised, to enforce the execution by the Defendant Company of a deed of further "assurance of the said fifty miles to the said Trustees upon the trusts mentioned in the said Indenture.

"4. And that leave may be given to them to take such other proceedings as they may be advised "for enforcing their rights in the premises.

"5. And that the reasonable costs of your Petitioners incurred on this petition may be allowed "and paid to them."

The Record does not show the whole of the proceedings on that petition; but the ultimate order made by the Appellate Court was, so far as material, as follows:—

"2. This Court doth further order that the Petitioners be at liberty to file a Bill in this Court "praying that the premises comprised in the security referred to in the said petition being the mortgage "bearing date the 16th day of April, A.D. 1886, may be sold, and that a Receiver of the revenues, tolls, "and profits may be appointed thereof.

"3. And this Court doth further order that the Petitioners be at liberty if they so desire to take "proceedings for the sale of the said premises or any part thereof under or in pursuance of any power "which they may have under the said security."

Why the order did not give leave to prosecute the remedy by entry, or generally any remedies to which the Plaintiffs might be entitled under the mortgage, is not explained in the Record. It is suggested that the Court considered the power of entry to be invalid; but it can hardly have been intended to make a final decision on such a point in the course of hearing a preliminary application for leave to sue, and not to allow it to be tried, if the Plaintiffs desired it, in the regular course of litigation.

The important consideration however for the present purpose is that the Plaintiffs accepted the order and framed their Bill in accordance with it. The Bill does, indeed, contain allegations that the Plaintiffs demanded, and that the Company refused, possession of the first Division; and that the Company deny the validity of the bonds, and of the mortgage, especially of the power to sell; and that owing to the antagonistic position of the Company a sale can only be made effectually under the direction of the Court. But the Company, while asserting that any entry by the Plaintiffs would be illegal, deny that any demand for it had been made, and they deny that the right to sell has ever been discussed, or that they have adopted any antagonistic position as alleged by the Plaintiffs. No evidence was given on these points; the Bill was not amended; and the specific relief prayed by it was, as before stated, confined to a judicial sale and the appointment of a Receiver.

It is under these circumstances that their Lordships are asked to treat the case as if the Plaintiffs had proved a case of obstruction and difficulties raised by the Company, either in derogation of their contract, or showing such discrepancies in the construction of the contract as would entitle the mortgagees to come to the Court for a declaration of its true meaning before they take action to enforce it. The questions now raised ought to have been raised on the pleadings and evidence so that they might be properly thrashed out in the Courts below. As the matter stands they have not been touched by the Courts below. When Mr. Robinson proposed to argue that the power of sale is invalid their Lordships were unwilling to hear him. They must equally refuse to hear (or at least to determine, for they have partially heard) discussions relating to the position of the Plaintiffs in the event of an entry, or of the purchaser in the event of a sale. They confine themselves to deciding the issues which the Courts below were invited by the Plaintiffs to decide, viz., whether there can be a judicial sale, and what it is that the Receiver of the revenues of the Division is entitled to receive. Finding that the Court of Appeal of Manitoba is right in its decisions, and

that no alteration is requisite except the correction of an ambiguity in its decree, they will humbly advise Her Majesty to dismiss the appeal ; and the Appellants must pay the costs.

The mode in which their Lordships think that the decree appealed from should be varied is by discharging paragraph 2 and substituting the following order :—

"Continue the Receiver till further order. Declare that according to the true "construction of the mortgage of the 16th April, 1886, the revenues, freights, tolls, "income, rents, issues, profits and sums of money thereby mortgaged were so mort- "gaged subject along with the other revenues of the Company's undertaking to the "working expenses of the Defendant Company's entire line of railway and telegraph "which in the ordinary course of conducting such line would fall upon them. Declare "that the Receiver is, and since his appointment has been, Receiver of the net earnings "which by Article 18 of the said mortgage the Company covenanted to apply to the "payment of the bond debts thereby secured. Order the Receiver to pay such net "earnings into Court to abide the further order of the Court or a Judge thereof."